United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

77-7233

United States Court of Appeals

For the Second Circuit.

RALPH McKECHNIE,

Plaintiff,

against

BEACH HAVEN ASSOCIATES, INC. and WORTHMAN HOUSING ASSOCIATES, INC.,

Defendants.

WORTHMAN HOUSING ASSOCIATES, INC.,

Third Party Plaintiff-Appellant,

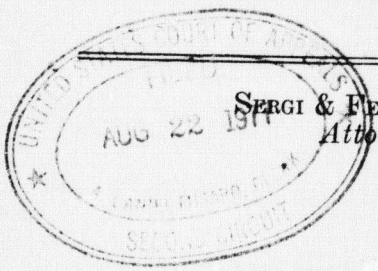
against

COLLYER ASSOCIATES, INC.,

Third Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

APPENDIX.



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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1977

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

RALPH MCKECHNIE,

Plaintiff,

against

BEACH HAVEN ASSOCIATES, Inc. and WORTHMAN HOUSING ASSOCIATES, Inc.

Defendants.

WORTHMAN HOUSING ASSOCIATES, Inc.,

Third-Party Plaintiff-Appellant,

against

COLLYER ASSOCIATES, Inc.,

Third-Party Defendant-Appellee.

ON APPEAL FROM THE EASTERN DISTRICT OF NEW YORK.

Relevant Docket Entries.

Date	Proceedings
8/22/74	Complaint filed. Summons issued.
8/29/74	Summons returned & Filed/Executed.
10/ 4/74	Answer with interrogatories filed.
3/31/75	Pltff's answers to interrogatories filed.
4/ 1/75	By Weinstein, J.—Order dtd 3-31-75 amending answer of deft Worthman Housing, etc. filed.

Relevant Docket Entries

8/21/75	Notice of Motion, ret. 9/5/75 filed *re*: for an order granting the deft leave to cause to be served upon Collyer Associates, Inc. a third party summons and complaint, etc.
9/ 8/75—	Affidavit of Jeffrey A. Nemerov in opposition filed.
12/10/75	By Mishler, J: Memorandum of Decision and Order dtd 12-10-75 granting deft's motion to implead Collyer Associates, Inc. as a third party deft filed. P/C mailed to attys. (mg)
1/27/76	Notice of change of firm filed. (mg)
3/10/76	Answer to cross complaint of Worthman Housing Assoc. filed.
3/10/76	Answer with cross complaint filed.
6/11/76	Third-party complaint with proof of service filed.
11/ 1/76	T-P summons issued.
11/11/76	Third party summons ret and filed/executed.
1/28/77	Before Mishler, CJ.—Case called. Pltff to submit to examination on 2-3-77 at the office of the pltff's atty. 3-21-77 for trial.
1/28/77	By Mishler, CH.J Order dtd 1-28-77 directing the pltff to submit to exam on Thursday, 2-3-77 at offices of Segan Culhane etc filed on back of document #14.
2/ 2/77	Interrogatories of Collyer Associates, Inc. to third party pltff—Worthman Housing Associates, inc. filed.
2/ 2/77	Interrogatories of Collyer Associates, Inc to Pltff—Ralph McKechnie filed.

Relevant Docket Entries

3/ 3/77	Notice of motion ret. 3/18/77 for an order pursuant to rule 37D of Fed. Rules of Civ. Pro. dismissing the def. and third party pltff Wortman Housing Ass. Inc., complaint for failure on part of def. & third party pltff. to answer interrogatories filed and third party def's Memorandum of Law filed
3/ 8/77	Answer of third party defendant filed.
3/18/77	Before Mishler, CH.J—Case called. Case to be reassigned to J. Dooling for trial on 4-4-77. Also motion to dismiss.
4/ 4/77	Before Dooling, J.—Case called. Complaint is dismissed as against Beach Haven Associates. Trial ordered and begun. The jury was selected and sworn in. All parties open. Trial continued to 4/5/77.
4/ 6/77	Before Dooling, J.—Case called. Trial resumed. Exam resumed. Deft moves to dismiss the complaint. Motion denied. Trial continued to 4/7/77.
4/08/77	Before Dooling J—Case called. Trial resumed. Jury retires to deliberate. Jury deliberation cont'd to 4-11-77.
4/ 7/77	Before Dooling, J—Case called. Trial resumed. Third party deft moves to have 3rd party complaint dismissed. Decision reserved. Trial cont'd to 4-8-77.
4/11/77	By Dooling, J—Order of sustenance filed.
4/11/77	Deft Worthman's requests to charge.
4/11/77	Pltff's requests to charge filed.
4/11/77	Request to charge filed.
4/11/77	Before Dooling, J. Case called. Jury deliberations resumed. Jury returned special verdict on written questions. Jury polled. Jury discharged. Trial concluded. Deft. to file motions. Clerk to enter judgment.

Relevant Docket Entries

4/11/77	By Dooling, J. Order of Sustenance filed. (Lunch)
4/12/77	Clerks judgment entered, Ordered that the pltff recover of def. Worthman Housing Ass., Inc., in the amt. of $260,000.00 together with interest and costs as taxed by clerk and that the third-pty compiaint against def. Collyer Associates, Inc., is dismissed on the merits, filed.
4/18/77	Notice of motion of def, & Third-pty pltff., Worthman Housing Associates, Inc. ret. 4/29/77 for an order pursuant to Rule 50 (b) of Fed. Rules of Civil Procedure vacating the dismissal of third-pty complaint as against def. Collyer Ass. Inc. as appears in a judgment entered in clerks office on 4/12/77 and Memorandum of Law of Third-Pty Pltff. Worthman Housing Ass. Inc., in support of motion for judgment notwithstanding the verdict pursuant to Rule 50 (b) of Fed. Rules of Civil Procedure, filed.
4/22/77	Affidavit in opposition to motion under rule 50 filed.
4/22/77	Memo of law in opposition to motion under rule 50 filed.
4/27/77	Bill of costs in the amount of $274.64 filed.
5/ 2/77	By Dooling, J—Memo & Order dtd 4-29-77 that the motion of deft-third party pltff to vacate the judgment on the claim over-against the third party defts is denied. mg
/ 6/77	Worthman Housings Associates, Incs' reply to Collyer's opposition to rule 50 (b) motion filed.
/ 6/77	Partial satisfaction of judgment filed.
/16/77	Notice of appeal for Worthman Housing Assoc. filed. mg
/25/77	Civil appeal scheduling order ret 6-20-77 filed. m g
/13/77	Civil appeal scheduling order #2 ret. 7-29-77 filed. mg

Plaintiff's Complaint.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

Plaintiff complaining of the defendants, by his attorneys, Segan, Culhane, Nemerov & Geen, P.C., respectfully show and alleges:

1. Upon information and belief, at all times hereinafter mentioned, the defendant, Beach Haven Associates, Inc., hereinafter referred to as "Beach" was a domestic corporation duly organized and existing under the laws of the State of New York with principal office located in Nassau County.

2. Upon information and belief, at all times hereinafter mentioned, Worthman Housing Associates, Inc., hereinafter referred to as "Worthman" was a domestic corporation duly organized and existing under the laws of the State of New York with principal office located in Nassau County.

3. That at all times hereinafter mentioned plaintiff was an employee of Collyer Associates, Inc., and was engaged in construction work at 50 Sicles Avenue, New Rochelle, New York, and was lawfully engaged in his occupation and employment at the above location at the time of the accident, to wit December 18, 1972.

4. Upon information and belief, at all times hereinafter mentioned, the defendant "Beach" was the owner of the aforementioned location.

5. Upon information and belief at all times hereinafter mentioned, the defendant "Worthman" was the owner of the aforementioned location.

6. Upon information and belief the defendant "Worthman" was a subsidiary of the defendant "Beach".

7. Upon information and belief, the defendant "Beach" had a contract with Collyer Associates, Inc., the employer of the plaintiff, for the performance of certain work at the aforesaid location.

8. Upon information and belief, the defendant "Worthman" had a contract with Collyer Associates, Inc., the employer of the plaintiff, for the performance of certain work at the aforesaid location.

9. Upon information and belief, the contract between "Beach" and Collyer Associates, Inc., was assigned to the defendant "Worthman".

10. Upon information and belief at all times hereinafter mentioned the defendant "Beach" was engaged in the general duties of a general contractor at the aforementioned location.

11. Upon information and belief, at all times hereinafter mentioned, the defendant "Worthman" was engaged in the general duties of a general contractor at the aforementioned location.

12. Upon information and belief at all times hereinafter mentioned, the defendant "Worthman" was the agent of the general contractor at the aforementioned location.

13. Upon information and belief, at all times hereinafter mentioned, the defendant "Worthman" prepared or caused to be prepared certain plans and specifications for the construction and erection work at the aforesaid location and ordered the type of equipment, material, supplies and services in the manner and method of their use in connection with the said construction work.

14. Upon information and belief, at all the times hereinafter mentioned, the defendant "Worthman" was in charge

of, and supervised, managed, controlled, inspected and directed the said work at the aforesaid location and employed superintendents and other officers, agents, servants and employees and generally supervised and directed said construction work.

15. That herefore and on or about the 18th day of December, 1972 while the plaintiff, pursuant to his employment for said employer as aforesaid, was lawfully on the said premises, he was caused to be injured and thereby sustained serious and permanent injuries to his person as a result of falling through a work area.

16. That the accident and injuries sustained by the plaintiff were caused by the carelessness, recklessness and negligence of the defendants and without any fault on the part of the plaintiff contributing thereto.

17. Defendants were negligent in their ownership, operation, management, control and supervision of the construction and erection of the said premises, in that owing to the carelessness, recklessness, negligence, improper and unlawful conduct of the defendants, their agent, servants and employees, the plaintiff sustained the injuries hereinafter alleged; in causing, allowing and permitting the said building under construction to be and remain in a dangerous improper and unlawful condition; in causing, allowing and permitting the use and operation of faulty and defective equipment and failing to properly supervise and inspect the same; in negligently employing agents, servants and employees who were incompetent and unskillful and so known to the defendants; and further, in permitting the installation and placing of material in a faulty and dangerous manner and location and without warning plaintiff and others thereof, although the defendants knew that the plaintiff and others were engaged in work in the vicinity; in negligently and carelessly causing, allowing and

permitting a defective flooring and planking to be installed and maintained in a dangerous and defective manner; defendants were further careless and negligent in failing to provide a safe and proper place for plaintiff and others similarly situated to work; defendants were further negligent in the premises all in violation of the laws and ordinance of the City and State of New York in such cases made and provided.

18. That as a result of the foregoing occurrence, plaintiff sustained severe and serious permanent personal injuries due to which he became sick, sore, lame and disabled; was injured internally and externally; was injured permanently about the body and limbs; did suffer and may in the future suffer pain as a result thereof; was confined to bed and home and may in the future be confined thereto; was obliged to have medical care and aid and attention in and endeavor to cure and alleviate his injuries; was required to pay therefor; that plaintiff was and may in the future be prevented from attending to his usual activities, thereby causing the plaintiff to suffer losses in earnings and future losses of earnings.

19. Plaintiff is a citizen of the State of New Jersey. Defendant, "Beach" is a corporation incorporated under the laws of the State of New York and has its principal place of business in a State other than New Jersey. Defendant "Worthman" is a corporation incorporated under the laws of the State of New York and has its principal place of business in a State other than New Jersey. The matter in controversy exceeds, exclusive of interest and costs the sum of $10,000.

20. That as a result of the foregoing occurrence plaintiff has been caused to sustain damages in the sum of One Million ($1,000,000) Dollars.

WHEREFORE, plaintiff demands judgment against the defendants in the sum of One Million ($1,000,000) Dollars, together with the costs and disbursements of this action.

SEGAN, CULHANE, NEMEROV & GEEN, P.C.
Attorneys for Plaintiff
By: JEFFREY A. NEMEROV
Office & P. O. Address
253 Broadway
New York, N. Y. 10007

To:

Beach Haven Associates, Inc.
and
Worthman Housing Associates, Inc.
550 Old Country Road

Answer of Worthman to Plaintiff's Complaint.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

The defendant, Worthman Associates, Inc., by its attorney John J. Langan, Esq., answering the complaint of the plaintiff herein; respectfully alleges upon information and belief:

FIRST: Denies any knowledge or information thereof sufficient to form a belief as to the allegations contained in the paragraphs designated: 1, 3, 4, 7, 8, 10.

SECOND: Denies each and every allegation contained in the paragraphs designated: 5, 6, 9, 12, 13, 14, 15, 16, 17, 18, 19, 20.

THIRD: Denies each and every allegation contained in the paragraph designated: 11 leaving all questions of Law to the Court at the trial of this action.

WHEREFORE, the defendant demands judgment dismissing the complaint herein together with the costs and disbursements of this notice.

Dated: Brooklyn, New York
Sept. 30, 1974

JOHN J. LANGAN, ESQ.
Attorney for deft. Worthman Associates,
By .....
A Member of the Firm
175 Remsen Street
Brooklyn, New York, 11201
858-9200

Answer of Worthman to Plaintiff's Complaint

To:

Segan, Culhane, Nemerov & Geen, P. C.
Attorneys for plaintiff
253 Broadway
New York, New York, 10007

Beach Haven Associates, Inc.
co-deft. in person
550 Old Country Road
Hicksville, New York

Our file #FO 373 L 44325 lm

Worthman's Third-Party Complaint.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

RALPH MCKECHNIC,

Plaintiff,

against

BEACH HAVEN ASSOCIATES, Inc., and WORTHMAN HOUSING ASSOCIATES, Inc.,

Defendants.

WORTHMAN HOUSING ASSOCIATES, Inc.,

Third Party Plaintiff,

against

COLLYER ASSOCIATES, Inc.,

Third Party Defendant.

Civil Action 74 C 1219

The defendant and third party plaintiff, Worthman Housing Associates, Inc., (hereinafter referred to as Worthman) by its attorney, John J. Langan, Esq., as and for a third party complaint against the third party defendant Collyer Associates, Inc., (hereinafter referred to as Collyer), alleges upon information and belief:

FIRST: That at all times hereinafter mentioned, the defendant third party plaintiff Worthman was a domestic corporation duly organized and licensed to do business in

the State of New York and having an office and principal place of business in the County of Nassau, State of New York.

SECOND: That at all times hereinafter mentioned, Collyer was and is a domestic corporation duly organized and existing under and by virtue of the laws of the State of New York.

THIRD: That at all times herein mentioned and at the time and place mentioned in the complaint, the third party defendant, Collyer was to furnish materials, supervision, labor, tools and equipment to completely face the parapet inside and out on the roof of Senior Citizens Apartments, located at 50 Sicles Avenue, New Rochelle, New York.

FOURTH: That at all times herein mentioned, the third party defendant Collyer was actually engaged in work as a subcontractor of Worthman at the aforesaid job site.

FIFTH: That the complaint of the claimant alleges among other things in substance that on or about December 18, 1972, the plaintiff was employed by Collyer, at the aforesaid job site and was lawfully engaged in his occupation and employment.

SIXTH: That the complaint of the claimant alleges among other things in substance that on or about December 18, 1972, while plaintiff was at the aforesaid job site, he was caused to sustain personal injuries, which the plaintiff claims was due to the negligence of the defendant.

SEVENTH: That on September 18, 1972, an agreement between contractor and subcontractor was entered into by Worthman and Collyer, which agreement pertains to the project at Senior Citizens Apartments, at New Rochelle, the job site where plaintiff was allegedly injured.

Worthman's Third-Party Complaint

EIGHTH: That pursuant to Article 11.20 of said contract Collyer was and is to indemnify and hold harmless Worthman for any claims against it as Contractor.

NINTH: That any injuries sustained by the plaintiff at the time and place mentioned in the complaint was embraced within said indemnification agreement and contract and the third party defendant, Collyer, is required to hold the third party plaintiff and defendant Worthman, free and harmless of any claims arising by reason of the subcontracting work as foresaid.

TENTH: That by reason of the foregoing, the third pary defendant, Collyer, will be liable to the third party plaintiff and defendant, Worthman, in the event and in the amount of recovery by the plaintiff.

ELEVENTH: That if as alleged in the plaintiff's complaint all of which is specifically denied, the plaintiff sustained injuries and damages in the manner and at the time and place alleged, and if it is found that the answering defendant and third party plaintiff is liable to said plaintiff, all of which is specifically denied, then said defendant and third party plaintiff, on the basis of apportionment of responsibility for the alleged occurrence is entitled to indemnification from and judgment over against the third party defendant Collyer for all or part of any verdict of judgment that the plaintiff, Ralph McKechnic may recover against the defendant and third party plaintiff, Worthman.

TWELFTH: That by reason of this action, said defendant and third party plaintiff, Worthman has and will be put to costs and expenses, including attorney's fees.

WHEREFORE, defendant and third party plaintiff, Worthman demands judgment against the third party defendant, Collyer for any sum that may be recovered against the

defendant and third party plaintiff by the plaintiff herein, together with the expenses incurred in connection with the defense of this action, and the costs and disbursements thereof, or in the alternative demand that pursuant to *Dole v. Dow Chemical Co.*, 30 N. Y. 2d 143, 331 N. Y. S. 2d 382, the ultimate rights of the defendant and third party plaintiff, Worthman, and the third party defendant Collyer, as between themselves be determined and that the defendant and third party plaintiff, Worthman Housing Association, Inc. and be indemnified by the latter for an amount in proportion to the relative responsibility of the parties to be determined on the facts, together with the costs and disbursements of this action, and for any expense incurred by it in the defense, thereof, including attorney's fees.

Dated: Brooklyn, N. Y.
October 29, 1976

Yours, etc.,

JOHN J. LANGAN, Esq.,
Attorney for defendant and third party plaintiff
175 Remsen Street
Brooklyn, N. Y. 11201
834-5600
our file #373 L 44325 cp

Collyer's Answer to Third-Party Complaint.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

The third party defendant, Collyer Associates, Inc., answering the third party complaint respectfully sets forth and alleges upon information and belief:

FIRST: Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraphs numbered "First" and "Twelfth" of the third party complaint.

SECOND: Denies upon information and belief each and every allegation contained in paragraph numbered "Third" of the third party complaint, and refers all questions of law to this Honorable Court.

THIRD: Denies each and every allegation contained in paragraphs numbered "Fourth", "Seventh", "Eighth", "Ninth", "Tenth" and "Eleventh" of the third party complaint, and refers all questions of law to this Honorable Court.

FOURTH: Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraphs numbered "Fifth" and "Sixth" of the third party complaint, and for all the allegations of plaintiff's complaint, reference is made to the complaint itself at the time of trial.

ANSWERING THE PLAINTIFF'S COMPLAINT

FIFTH: Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraphs numbered "1", "2", "4", "5", "6" and "13" of the plaintiff's complaint.

Collyer's Answer to Third-Party Complaint

SIXTH: Denies upon information and belief each and every allegation contained in paragraphs numbered "3" and "11" of the plaintiff's complaint, and refers all questions of law to this Honorable Court.

SEVENTH: Denies upon information and belief each and every allegation contained in paragraph numbered "7" of the plaintiff's complaint, and for all the terms of the contract between "Beach" and Collyer Associates, Inc., if any, reference is made to the contract itself at the time of trial, and refers all questions of law to this Honorable Court.

EIGHTH: Denies each and every allegation contained in paragraphs numbered "8", "9" and "15" of the plaintiff's complaint, and refers all questions of law to this Honorable Court.

NINTH: Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraphs numbered "10", "12" and "19" of the plaintiff's complaint, and refers all questions of law to this Honorable Court.

TENTH: Denies each and every allegation contained in paragraphs numbered "14", "16" and "18" of the plaintiff's complaint, insofar as this answering third party defendant is concerned.

ELEVENTH: Denies each and every allegation contained in paragraph numbered "17" of the plaintiff's complaint, insofar as this answering third party defendant is concerned, and refers all questions of law to this Honorable Court.

TWELFTH: Denies each and every allegation contained in paragraph numbered "20" of the plaintiff's complaint.

Collyer's Answer to Third-Party Complaint

AS AND FOR A SEPARATE AFFIRMATIVE AND DISTINCT DEFENSE TO PLAINTIFF'S ALLEGED CAUSE OF ACTION, THE DEFENDANT RESPECTFULLY SETS FORTH AND ALLEGES:

THIRTEENTH: That if the plaintiff sustained any injuries as alleged, such injuries were caused by his own fault and negligence, wholly or partially.

EACH ANSWERING DEFENDANT ASSERTS A CLAIM OVER PURSUANT TO SEC. 3019 CPLR AND DOLE V. DOW FOR APPORTIONMENT AGAINST DEFENDANTS, BEACH HAVEN ASSOCIATES, INC., AND WORTHMAN HOUSING ASSOCIATES, INC.

FOURTEENTH: If any plaintiff was caused to sustain the damages as alleged in the complaint, said damages will have been sustained by reason of the negligence of each party against whom a claim is being asserted and if any defendant claiming over is also found negligent, then such defendant will be entitled to be indemnified, in whole or in part, by each negligent part named in this claim over, for the portion of the plaintiff's damages which were caused by the negligent party named in this claim over, together with all attorneys' fees, cost of investigation and disbursements.

WHEREFORE, each answering defendant demands judgment:

(1) Dismissing the complaint,

(2) For indemnification on the claim over against defendants, Beach Haven Associates, Inc., and Worthman Housing Associates, Inc.

(3) For costs and disbursements against adverse parties.

McLAUGHLIN, SIMONE & LAWLOR
SAMUEL F. FINE
a member of the firm
Attorneys for Third Party Defendant Collyer Associates, Inc.
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80 John Street
New York, New York 10038
(212) 248-4430

Motion of Defendant, Third-Party Plaintiff, Worthman Housing Associates, Inc., for Judgment Notwithstanding the Verdict Pursuant to Rule 50(b) of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

SIRS:

Please Take Notice that upon the annexed affidavit of Lester E. Fetell, duly sworn to the 18th day of April, 1977, upon the record of the trial herein, and upon all of the pleadings and proceedings heretofore had herein, the undersigned will move this Court before the Honorable John F. Dooling, Jr., United States District Judge, at the United States Courthouse, Cadman Plaza, Brooklyn, New York, on the day of , 1977, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an:

1. Order, pursuant to Rule 50 (b) of the Federal Rules of Civil Procedure vacating the dismissal of the third-party complaint as against defendant Collyer Associates, Inc., as appears in a judgment entered in the Office of the Clerk of this Court on April 12, 1977 and directing entry of judgment in favor of third-party plaintiff, Worthman Housing Associates, Inc. and against Collyer Associates, Inc., third-party defendant, in the sum of $260,000 in addition to attorneys' fees, costs and disbursements to be fixed by the Court or,

2. In the alternative, ordering a new trial with respect to the issues contained in the third-party complaint herein.

Motion of Defendant, Third-Party Plaintiff, Worthman Housing Associates, Inc., for Judgment Notwithstanding the Verdict Pursuant to Rule 50(b) of the Federal Rules of Civil Procedure

3. For such other, further and different relief as this Court may deem just in the premises.

Dated: Brooklyn, New York
April 18, 1977

Yours, etc.,

SERGI & FETELL
Attorneys for Worthman Housing Associates, Inc.
Office & P. O. Address
44 Court Street
Brooklyn, New York 11201

To:

Clerk
United States District Court
Eastern District of New York

Quirk & Bakalor, P. C.
Attorneys for Collyer Associates, Inc.
444 Madison Avenue
New York, New York 10022

Segan, Culhane, Nemerov & Geen, P. C.
Attorneys for Plaintiff
253 Broadway
New York, New York 10007

Memorandum and Order Denying Worthman's 50(b) Motion.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

Appearances:

Lester E. Fetell, Esq. (Messrs. Sergi & Fetell of Counsel) for defendant third-party plaintiff.

Richard Bakalor, Esq. (Messrs. Quirk & Bakalor of Counsel) for third-party defendant.

DOOLING, D. J.:

The jury, in this diversity action by a subcontractor's employee against the defendant owner-general contractor on a building project, found that the plaintiff was using a certain makeshift scaffold at the direction or with the permission of the owner-general contractor, that he fell from the scaffold by reason of a defect in it and sustained serious injuries in consequence of the fall and that no negligence on the part of his employer, the third-party defendant, contributed to the happening of the accident. Judgement has been entered on the special verdict in favor of plaintiff against the defendant and third-party plaintiff Worthman and in favor of the third-party defendant Collyer against third-party plaintiff Worthman. The jury instructions authorized the jury to find against the third-party defendant Collyer only if they found it guilty of negligence toward plaintiff. The instructions were that plaintiff's claim against Worthman the owner-general contractor was a claim under New York Labor Law, Section 240 but that, in deciding whether or not plaintiff's injury was, under the indemnification clause of the contract between Worthman and Collyer, caused "in whole or in part by any negligent act or omission of" Collyer, the jury had to find common law negligence because Collyer, as ornamental iron work subcontractor, was not covered by Section 240.

Memorandum and Order Denying Worthman's 50(b) Motion

Worthman moves now for judgment over against the third-party defendant Collyer notwithstanding the verdict for the amount of plaintiff's judgment against it (and for attorney's fees and costs), or in the alternative for a new trial on the claim over. The issue is whether such a subcontractor as Collyer is as a matter of statutory interpretation a "contractor" within the intention of the word "contractors" as used in Section 240(1) which, so far as material, reads (as amended by Chapter 1108, §1 of the Laws of 1969):

> "1. All contractors and owners and their agents, in the erection * * * of a building * * * shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding * * * and other devices which shall be so constructed [and] placed * * * as to give proper protection to a person so employed."

The third-party defendant Collyer was plaintiff's employer, and hence not directly liable to him, but under the contract between them Collyer agreed to indemnify Worthman against liability for third-party injuries only if the injuries were caused in whole or part by "any negligent act or omission" of Collyer. Two questions then are presented: *First,* if Section 240 were applicable to Collyer, would failure to perform the statutory duty owed to plaintiff be "a negligent act or omission" under the indemnity clause? If so, then, *Second,* does Section 240 apply to an ornamental iron work subcontractor on a building project?

1. The liability imposed by Section 240 is spoken of as absolute in the sense that negligence need not be proved and contributory negligence (under the older law) was not a defense. But breach of the statutory duty must be shown; there must be either a complete failure to furnish the required device or the device furnished must be

shown to fail of being so constructed or so placed or so operated as properly to protect the workman. Failure to discharge the statutory duty can readily be phrased in the language of negligence, and a case brought under Section 240 would be thought of as, loosely, a negligence case. It may be doubted that such a case would be regarded as one to enforce a liability imposed by statute. What is meant by negligence in its most inclusive sense is the unintentional invasion of a legally protected interest of another in his person or property. It is said that negligence is always conduct, and Restatement of the Law Second, Torts, §284, generalizes that negligent conduct may be either an act which a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another, or a failure to do an act, necessary for the protection or assistance of another, which the non-actor is under a duty to do. And Section 285 tells us

> "The standard of conduct of a reasonable man may be
>
> (a) established by a legislative enactment or administrative regulation which so provides, or
>
> (b) adopted by the court from a legislative enactment or an administrative regulation which does not so provide, or
>
> (c) established by judicial decision, or
>
> (d) applied to the facts of the case by the trial judge or the jury, if there is no such enactment, regulation, or decision."

A liability imposed under Section 240 is not imposed in the absence of actionable negligence; the liability is imposed rather on the ground that to perform the duty ill or to fail to perform it altogether is inexcusable

negligence but it remains characteristically a negligence liability and not a liability for intentional tort, nor a contractual liability.

It follows that a failure to provide an adequate scaffold or a failure to provide any scaffold that causes injury falls within the language of the indemnity. Broadly, such a standard clause is surely intended to cover on the job accidents to construction workers where the subcontractor's breach of a duty of care is in whole or part a cause of the injuries resulting from the accident.

2. The opening language of Section 240 presents the dilemma. It does not say "All general contractors" nor say, as it might have if the sentence started with "In the erection * * *" and the identification of the duty-bearer were inserted after "structure" and before "shall," some such expression as "* * * the general contractor or the owner * * *". The section does not start "All contractors, subcontractors and owners." The term subcontractor is used throughout Article 8, Sections 220 *et seq.* of the Labor Law (Public Work contracts) but seems not to be used at all in Article 7, Sections 200 *et seq.* (General Provisions for work-place safety). In Article 10, Sections 240 *et seq.* (Building Construction, Demolition and Repair Work), it was used in former Section 241 (all areas in which excavation, construction or demolition is going on shall be so conducted by the "owners, contractors, and subcontractors as to provide reasonable and adequate protection and safety to persons on the site"), but present Section 241 directs its commands to "All contractors and owners and their agents, when constructing or demolishing buildings or doing any excavating in connection therewith," and it repeats in subdivision 6 the language of former Section 241. Certain of the requirements of new Section 241 are specific but are not distinctly such that they would not fall within a general

contractor's general duty to determine the order of the work and the security of the site for the various trades coming to it (*e. g.* subdivision 1 through 5). Present Section 240 and 241 were enacted in the same bill (except for the addition in 1974 to Section 241 of present subdivision 8).

Worthman argues that the liability of Collyer under former Section 240 was clear—it imposed the statutory duty on "A person employing or directing another to perform labor of any kind" in building construction—and the plain purpose of the legislature was to increase, not diminish, safety assurances of workers by, in effect, making the owner and general contractor additionally liable, along with the employing subcontractor for any breach of the duty. Plaintiff notes that under the old law the injured workmen in the general case had only Workmen's Compensation Law relief because, usually, his employer was also the one who directed his work. Collyer argues that the meager legislative history—the brief report of two sponsors of the bill and the longer report of the State AFL-CIO—make clear that the intention was to return "the safety responsibility to where it belongs—owners and contractors", and the legislators' report, similarly speaks of placing "responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and *general* contractor" (emphasis added). But the report says also that the responsibility so placed is the "ultimate" responsibility and it speaks further of the owners and contractors as being "primarily" responsible for the erection of the building. The State AFL-CIO report says also that the bill changed earlier law "by removing the present reference to a subcontractor [a reference appearing only in former Section

241 not in Section 240] as one having direct responsibility for safety practices and *limiting* such responsibility to the owner and general contractor as was the case before the 1962 amendments" (emphasis added).

If Collyer's argument is accepted, the subcontractor's own employees lose nothing, since they are limited to a Workmen's Compensation award in any case, and gain a third-party right of action that is more readily enforceable than would be a common law claim so far at least as concerns cases within Section 240. A safety disincentive might be thought to exist in relieving the subcontractor of his Section 240 liability to third-party workmen on the job, but there is much force to the argument that the stricter liability imposed on the owner and general contractor furnish a more than merely compensatory safety incentive. On Worthman's view of the effect of the change in Section 240 owners and general contractors would be, practically, sureties entitled, in the general instance of the statute's application, to an all but automatic claim-over against the subcontractor whenever the accident arose out of a default in furnishing a safety device conventionally supplied by the subcontractor—for example, the painting subcontractor and hanging scaffolds.

The New York cases do not yet give an answer. The language in *Rocha v. State of New York*, 3rd Dept. 1974, 45 A. D. 2d 633, 360 N. Y. S. 2d 484, 487-488, is suggestive rather than adoptive of the interpretation that the statutory duty imposed by Section 240 on owners and general contractors is not imposed on but intentionally removed from the shoulders of subcontractors in relation to their part of the construction job. While the question is about as close and the considerations as nicely

balanced as can well be imagined, history and the meager legislative history lead again to the conclusion adopted in instructing the jury, that is, that Collyer is not under the statutory duty imposed by Section 240 but, rather, is liable under the indemnity agreement only if its negligence contributed to the happening of the accident.

It is, accordingly,

ORDERED that the motion of defendant-third-party plaintiff to vacate the judgment on the claim-over against the third-party defendant, and for other relief, is denied.

Brooklyn, New York
April 29, 1977.

JOHN F. DOOLING, JR.
U. S. D. J.

Third-Party Defendant Collyer's Request to Charge.

1. In the third-party action, the third-party plaintiff has the burden of proving the essential elements of its case by a preponderance of the evidence and, if the proof fails, in your judgment, to establish any essential element of the third-party plaintiff's case by a preponderance of the evidence, then your verdict must be for the third-party defendant.

2. Though Section 240 of the Labor Law imposes a statutory obligation upon the defendant Worthman, if you find that in fact the plywood was a scaffold, said Section 240 of the Labor Law is not applicable to plaintiff's employer, Collyer.

3. However, if you find that Worthman was at fault in failing to provide proper scaffolding on the canopy but only so decide due to a violation of one of the Rules of the Board of Standards and Appeals referred to previously, then I direct you that contributory negligence of the defendant, if any, would bar a recovery on behalf of the plaintiff (*Conte v. Large Scale Development Corp.*, 10 N. Y. 2d 20; *DiLeo v. Lincoln Center*, 38 A. D. 2d 830, 329 N. Y. S. 2d 637).

4. Collyer did undertake to hold Worthman harmless from all damages, claims and costs arising out of such accidents if due in whole or in part to a negligent act or negligent omission on Collyer's part.

5. Thus, if you find that the plywood herein was a scaffold and also find against Worthman for failure to provide proper scaffolding on the job and in use for the canopy part of the job, then you must consider whether Worthman has proven that a negligent act or negligent omission of Collyer's was a substantial factor in contributing to the occurrence of the accident herein. If you find that a negligent act or negligent omission of

Collyer's was a substantial factor in contributing to the occurrence of the accident herein, then you must find in favor of Worthman on its third-party claim whereas if you do not so find then you must find in favor of Collyer on the third-party claim.

6. In this regard, negligence is lack of ordinary care. Under the facts in this case, negligence would be a failure to exercise that degree of care which a reasonable employer would have exercised under the same circumstances. It may arise from doing an act which a reasonably prudent employer would not have done under the same circumstances or, on the other hand, from failing to do an act which a reasonably prudent employer would have done under the same circumstances.

7. In determining whether Collyer was or was not negligent, you must determine whether Collyer breached any duty which it owed to its employee McKechnie and, if you find that Collyer did not breach any such duty to McKechnie, then I direct you that you must find in favor of Collyer on the third-party action.

8. Collyer, as McKechnie's employer, owed McKechnie the duty to exercise the degree of care a prudent employer would have exercised so as to provide McKechnie with a safe place to work or to have remedied any unsafe condition known to the employer or existing for such a length of time that, in the exercise of reasonable care, should have been observed and remedied by the employer. However, in determining whether Collyer was negligent, I direct you that Collyer cannot be considered negligent if it did not protect its employee against a defect or danger which was readily observable by the plaintiff considering plaintiff's age, intelligence and experience (*McLean v. Studerbaker Brothers Co.*, 221 N. Y. 475) nor can Collyer be considered negligent if you find

that the plaintiff put a common structural object to an unintended use (*Jones v. Radio City Music Hall,* 38 A. D. 2d 909, 329 N. Y. S. 2d 684, affd. 31 N. Y. 2d 790).

9. I also charge you that the fact that an accident occurred to the plaintiff carries with it no presumption of negligence on the part of Collyer (*Pyne v. Cazenovia Canning Co.,* 220 N. Y. 126).

10. If you find that working on the platform was dangerous and that Collyer, through the knowledge of McKechnie knew and fully appreciated it was dangerous but that McKechnie in exposing himself to the danger was proceeding pursuant to the direction of Worthman's Mr. Surdo, then you must decide whether it was reasonable under all the circumstances as you find them to have existed at the time and place of the occurrence for McKechnie on behalf of Collyer to have complied with the direction. If you find McKechnie acted reasonably in following the direction, you must find in favor of Collyer on Worthman's claim against it whereas if you find that McKechnie acted unreasonably in following such directions, then you must find in favor of Worthman on its claim against Collyer (adapted from P.J.I. 2:56.).

11. You will also observe that Section 11.11 of the contract makes the contractor's equipment available to Collyers at the contractor's discretion.

12. If you find that Collyers only entered into a contract with Beechhaven and did not enter into a contract with Worthman then in any event you must find against Worthman on its contractual claim against Collyers.

Charge.

(V-229) The Court: Bring the jury in.

(Jury entered the courtroom.)

The Court: Members of the jury: You have heard the evidence in the case and the arguments of counsel and now must receive the instructions on the law that govern the case.

You, the jurors, are the sole judges of the facts. You must, however, follow the law as given to you in these instructions and apply it to the facts as you find them for the evidence before you. You are not free, nor am I, to substitute or private judgment as to what the law should be for what the law in fact is.

You have been sworn as jurors well and truly to try this case and to render a true verdict. You must, exclude from your deliberations all bias and prejudice. You must not permit yourselves to be governed by sympathy or any other considerations not founded in the evidence and these instructions on the law.

The defendant and the third party defendant in (V-230) this case are corporations and they can act only by their agents, servants or employees. Therefore, whenever mention is made of the corporate defendants doing or not doing anything, that refers to its agents, servants or employees acting within the scope of their employment.

In this, a civil action, the parties having the burden of proof on a particular fact must prove the fact in issue by a preponderance of the evidence. A fact proved by a preponderance of the evidence when the evidence to support that fact is such that, when considered and compared with all the other evidence relating to it, it produces in your minds the belief that what is sought to be proved is more likely the fact than not the fact. In determining whether any fact in issue has been proved by a preponderance of the evidence relating to it, you

consider the testimony of all the witnesses, regardless of of who may have called them, and of all exhibits received in evidence, regardless of who may have produced them.

The plaintiff has the burden of proving the essential elements of his case by a preponderance of the evidence, and if the proof failed in your (V-231) judgment to establish any essential element of the plaintiff's case by a preponderance of the evidence, then your verdict must be for the defendant.

The plaintiff has sued the owner of and general contractor on the building project, Worthman, for personal injuries that he sustained in the accident of December 18, 1972. Worthman denies responsibility for the accident and, in addition, has sued Collier alleging that if it, Worthman, is liable to plaintiff, then Collier is liable to it for all or part of any damages that may be awarded to the plaintiff against it. You will be concerned first with the claim of plaintiff against Worthman. If, and only if, you conclude that Worthman is liable to the plaintiff do you turn to the claim of Worthman against Collier.

It is not disputed that Worthman was both the owner of the property under construction and the general contractor for the construction of the building. Nor is it disputed that Collier was the plaintiff's employer. There is no dispute that plaintiff went up on the canopy to attach fascia, that is pieces of ornamental iron work, to the outer side of the canopy. Those engaged in the building trade have a general duty to construction workers like (V-232) plaintiff to see to it that their work places are so constructed, arranged and conducted as to provide reasonable and adequate protection and safety to those persons employed in the work places and the State Board of Standards and Appeals has the power

to make rules to carry into effect the provisions of the labor laws.

Section 240 of the Labor Law of New York more specifically provides further that: "All contractors or owners and their agents, in the erection of a building or structure shall furnish or erect, or cause to be furnished or erected for the perfomance of such labor, scaffolding, ladders and other devices which shall be so constructed and placed as to give proper protection to a person so employed."

Now, the word contractors as used in the Statute, means the general contractors and does not include subcontractors such as Collier Associates.

The Board of Standards and Appeals has defined a scaffold as, "A temporary elevated working platform and its supporting structure including all components."

The plywood boards atop the canopy, as described in the evidence, constituted scaffolding as a matter of law if they were, at the direction or with the (V-233) permission of Worthman's superintendent used by plaintiff to stand on while he worked at affixing the fascia to the canopy or if they were before December 18, 1972, used by Worthman or by other trades to stand on while working with the permission or at the direction of Worthman's superintendent.

In addition, if you conclude from the evidence that for plaintiff and Richard Falasca to attach the fascia to the perimeter beams of the canopy required them to use either a scaffold or ladders and you conclude that Worthman's superintendent was aware of that, Worthman was required under Section 240 of the labor law to furnish for such work scaffolding or ladders so constructed and placed as to give proper protection to plaintiff and Richard Falasca. If you find that the plywood boards were so used as a scaffold then you

must determine whether or not the scaffolding reasonably and adequately protected the safety of the plaintiff.

In deciding that you may consider as evidence of the standard of construction to be used in making a scaffold the provisions of Section 23-5.1(c)(1) and (2) and (j)(1) of the Regulations of the Board of Standards and Appeals. They provide that, "except (V-234) when otherwise specifically provided in this subpart, all scaffolding shall be so constructed as to bear four times the maximum weight required to be placed thereon when in use. Every scaffold shall be provided with adequate horizontal and diagonal bracing to prevent any lateral movement. The open sides of all scaffold platforms shall be provided with safety railings constructed and installed in compliance with this rule."

Similarly, so far as the scaffolding's platform area was concerned, Section 23-1.22(c) requires the use of two inch planks or three quarter inch plywood or metal of equivalent strength and in the case of work area platforms, more than seven feet above ground, requires that there be a safety railing.

It is for you to say from all the evidence, including the rules of the Board of Standards and Appeals, whether the two ply boards constituted scaffolding so constructed and laced as to give plaintiff proper protection while he was engaged in installing the canopy fascia.

If you conclude that Worthman was required only to furnish ladders for plaintiff and Falasca to work from, then it is for you to say whether the ladders (V-235) that Worthman's superintendent made available to plaintiff were so constructed and could be so placed as to give proper protection to plaintiff and Falasca to do the work required to attach the fascia to the beams. If you conclude that the ladders furnished were not such as

to give proper protection to plaintiff and Falasca in doing their work, then the furnishing of the ladders did not discharge Worthman's statutory duty to furnish proper devices.

You will observe that the language of the specifications of the contract required Collier to furnish any scaffolding and other equipment needed for its work and made available to Collier Worthman's equipment at Worthman's discretion and on mutually satisfactory terms. That fact and those provisions, however, does not relieve Worthman of its statutory responsibility.

If you conclude that Worthman was at fault in that the two plywood boards did not constitute scaffolding on the canopy so constructed and placed as to give plaintiff proper protection, you must then consider whether the deficiency in the plywood platform caused plaintiff's fall and injury. I must say to you that in this case and so far as the plaintiff's (V-236) claim against Worthman is concerned, you are not concerned with whether or not plaintiff was negligent of his own safety in going on the canopy with the plywood boards in the condition that they were. In this kind of case, plaintiff's own negligence, if he was negligent, does not bar his recovery.

If you find from the evidence that Worthman is liable because the plywood boards constituted an unsafe scaffolding, and that such failure caused plaintiff's fall and injury, then you must consider whether, as Worthman asserts, Collier is liable to it.

Worthman has burden of proving the essential elements of its claim over against Collier by a preponderance of the evidence, and if the evidence fails in your judgment to establish any essential element of Worthman's case by a preponderance of the evidence, then your verdict must be in favor of Collier.

Charge

As between Worthman and Collier, Worthman must show that a negligent act or a negligent omission of Collier or one of its employees was, in whole or in part, a cause of plaintiff's accident.

Now, you have heard the stipulated material bearing on the contract that Collier entered into (V-237) covering the work. The evidence is that the copy of the contract, Exhibit Number I, with Collier that was sent to and signed and returned by Collier were signed in the name of Beachhaven Builders and that the contract specifications likewise showed the name Beachhaven Builders. It does not appear that there was any corporation with exactly that name and it is not a correct corporate designation. The entire project, however, was executed by Worthman under a contract with the New Rochelle Housing Authorities. Worthman supervised the construction in the role of general contractor and Worthman made the payments to Collier for its work. On these facts, as a matter of law, the contract Collier signed inured as a contract with Worthman and its terms and provisions bound Worthman and Worthman could claim the benefit of its provisions in its relation with Collier.

Collier undertook in its contract to hold Worthman harmless from all damages, claims and costs arising out of such accidents if and only if the accidents were due in whole or part to negligent or omission on Collier's part. In this respect, Collier owed to its employees the duty to provide them with a safe place to work, and that would include providing proper (V-238) scaffolding where needed to do the work. Collier, acting through plaintiff and Falasca and their superiors, was under a duty to plaintiff to see to it that any necessary scaffolding was on the job and in use for the canopy part of the job whether provided by Worthman or Collier

itself. If, therefore, you find from the evidence that adequately safe scaffolding or other means of safely installing the fascia were not provided, and that was known to Collier through the knowledge of its employees, including plaintiff, or should have been known to it, then that would constitute negligence or a negligent omission on Collier's part and you must then find for Worthman on its claim over against Collier.

In considering the claim over against Collier for all the damages awarded against Worthman, your task is to determine whether Collier breached the duty it owed to plaintiff to furnish him with a safe place to work. You must take into account all of the evidence bearing in mind that if on this aspect of the case, and on this claim only, you are to consider whether the plaintiff or Richard Falasca or both were negligent in their inspection or failure to inspect the plywood boards and deciding to go upon (V-239) canopy.

Negligence is lack of ordinary care, the failure to do what an ordinary prudent person would do under the similar circumstances, or the doing of what a person of ordinary prudence would not do in the same circumstances.

If you conclude that the plaintiff was negligent in proceeding as he did, then that negligence is Collier's unless you are satisfied in all the circumstances that the risk was so evident that you conclude that plaintiff's proceeding as he did could not fairly be regarded as an act in the course of his employment and in the service of Collier.

Now, in considering this last aspect of the claim over, bear in mind that plaintiff's negligence, if any, is wholly irrelevant to plaintiff's claim against Worthman and should not be discussed in considering that claim.

Charge

If you find Worthman liable, then you must determine the amount of plaintiff's damages. The plaintiff's damages include the reasonable value of the medical services required by the injuries he suffered in the accident; the reasonable value of the hospitalization and hospital care, including X-ray and other services (V-240) required by his injuries, and the reasonable value of any other medical, hospital and other such expenses that you find he is reasonably likely to require for future treatment of the injuries sustained in the accident. The plaintiff's damages include such sum as you find represents a reasonable compensation in money for the pain and suffering caused by the accident and his injuries and such further sum as you find will so compensate him for any future pain and suffering that you find that he is reasonably likely to suffer in future from his injuries.

Finally, plaintiff's damages include such amount of earnings as you find from the evidence that the plaintiff has lost to date by reason of his injuries sustained in the accident and is reasonably likely to in future by reason of his inability to work at his former employment because of his injuries sustained in the accident. You must determine, in this last matter, whether you are satisfied that the injuries sustained have impaired plaintiff's earning capacity; if so, to what extent.

You then add these several items up to reach a single damage sum. In considering the amount of your award in respect of any continuing pain, suffering, (V-241) physical impairment and loss of earnings that you conclude from the evidence that plaintiff will experience, you may take into account the expectation of life of a man plaintiff's age: That is, 34.9 years. That is an average only and in considering it, you must take into account all of the evidence before you bearing on plain-

tiff's individual condition of health. So, too, in determining loss of future earnings, you may consider the average expectation of the working life of a healthy male of 37 years is about 28 years.

A person who has been injured is not permitted to recover for damages that he could have avoided by using means that a reasonably prudent person would have used to alleviate his injury and its pain. Defendant contends that if plaintiff submitted to operations his injury and pain would be alleviated and that such operations are not dangerous. If you find for plaintiff, then in determining the nature and premanence of his injury and what damages he may recover for the injury, you must decide whether in refusing to have operations plaintiff acted as a reasonably prudent person would under the same circumstances.

In deciding that question, you will take into (V-242) consideration so much of the evidence introduced by both sides as you credit concerning the nature of the operations, the extent to which such operations involve danger to plaintiff and the results to be expected from them. If you find that in making the determination not to have the operations, plaintiff acted as a reasonably prudent person would, then he is entitled to recover for his injuries as you find them to be without regard to the possibility of surgical operations. If, however, you find that either or both operations are ones that a reasonably prudent person would submit to and that either or both operations would alleviate the injury or relieve the pain or do both, you will take that into consideration in arriving at the amount of damages, if any, that you award.

I will not summarize the evidence. You have heard eight witnesses, to name them in the order in which they testified: Richard Falasca, Matthew Russo, Ferman

Clark, Ralph McKechnie, George Truckly, Ralph Lamo, Andrew Surdo and Samuel S. Cohen. 28 exhibits have been received in evidence.

I have said that you must decide the case on the evidence. The evidence is the testimony of these (V-243) witnesses and the exhibits received in evidence and the facts that have been stipulated to before you.

Statements and arguments of counsel and answers stricken from the record are not evidence. The evidence includes, of course, what is brought out on cross examination as well as what is testified to under direct examination.

Your verdict must be based on the evidence, but in your consideration of the evidence, you are not limited to the bare words of the witnesses and the bald facts that you find have been proved. The evidence includes the inferences reasonably to be drawn from the testimony which you hear and the facts which you find have been proved.

You are the sole judges of the credibility of the witnesses. The motive and state of mind of each witness as they appear to you and the circumstances and inducements under which the witness testified are to be taken into account. Consider any relation each witness may bear to either side of the case and the manner in which the verdict might affect him.

The testimony of plaintiff is competent and is to be judged by you by the same standards as that of any other witnesses, including inevitably the effect (V-244) of his interest in the outcome of the case. You may consider the appearance and manner of each witness on the witness stand, the witness' apparent candor or lack of it, and the character of the testimony given, whether the testimony contains inconsistencies or discrepancies, whether it is intrinsically, credible, or seems to you

in whole or part improbable, and whether it conflicts with other testimony or is consistent with other testimony in the case.

In weighing the effect of conflict or discrepancy consider whether it pertains to a matter of importance or to unimportant details and whether it seems to you to result from innocent error or from falsehood. If you find a witness has been mistaken or untruthful in all or in part of the testimony given, then you may give the testimony of that witness such credit, if any, as you think it deserves in the light of the nature and extent of the defects that you find in it.

Where a party has made a statement out of Court or testified in a deposition before trial, such a statement or such testimony may be offered as evidence against the party. If a party's out of Court statement or testimony and his incourt testimony before you are contradictory or inconsistent, you can reject both (V-245) versions or accept one of the versions if you conclude that version is credible.

If you conclude that a witness has knowingly testified falsely concerning any material matter, you have a right to distrust that witness' testimony in other particulars. You may reject all the witness' testimony or give it or parts of it the credence you think it deserves.

The evidence has included certain expert testimony. Ordinarily, opinions of witnesses are not received in evidence. However, opinions of expert witnesses are an exception to the rule. A witness who, by training and experience, has become well versed in an art, science, profession, or calling, is permitted to give you his opinion on matters in which he is versed and which is material to the case and he is permitted also to give you the reason for and the basis of his opinion.

Charge

You should weigh and evaluate the testimony of an expert witness precisely as you weigh the testimony of any non-expert witness. Take into account the robability and reasonableness of the matters to which he has testified, the schooling he has had, the learning and standing he has in his calling, or the (V-246) want of it and whether he has had that breadth of experience in the field which would lend weight to his opinion. You should ask yourselves: Is this witness by these standards qualified by training and experience to render valid and reliable opinions on the topics on which he testified? His testimony should be given the weight to which on such analysis you conclude that it is entitled. If you conclude that the witness is not sufficiently qualified or that the basis of his opinion is inadequate, you may entirely reject his testimony.

I have sought not to comment on the evidence or to give any impression as to my view, if I have one of the relative weight of the evidence. If I have done so, however, you may disregard it entirely for you are the sole judges of the facts.

From time to time in the course of the trial objections have been made and rulings on evidence given. Draw no inference from the comparative frequency of objections of one or the other side or from the comparative record in having objections sustained. Where an objection to a question has been sustained, disregard the question and draw no inferences from its wording about the answer that might have been (V-247) given. Where an objection is overruled, evidence when received has no special weight just because unsuccessfully objected to.

Your verdict must be unanimous. It is your duty as jurors to consult with one another and to deliberate with a view to reaching agreement if you can do so

without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors.

In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. Your task is one of conscience, and pride of opinion has no place in matters of conscience. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. You are not partisans; you are judges, judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

When you have reached a decision and are ready to report, simply advise the marshal that you have (V-248) reached a decision without disclosing orally or in writing what it is. The form of your verdict is very simple. It will be a special verdict consisting in answering four written questions which will be supplied to you when you retire to deliberate your verdict.

Let me read the questions:

The first question: Was the plywood board on the canopy used as a scaffold by plaintiff at the direction or with the permission of Worthman?

You will answer that either yes or no. If your answer is yes, then go on to the next question. If your answer is no, then you proceed no further. That is the end of the case. The verdict then will be for the defendant.

Second question: Did plaintiff fall from the canopy because of the inadequacy of the plywood board as a scaffolding?

You will answer that question either yes or no. If you answer yes to it, you go on to the next question.

If you answer no, then again that will be the end of your deliberations.

The third question, assuming you have answered yes to the first two, is: What was the amount of (V-249) plaintiff's damages resulting from the accident.

Then you simply insert the dollar amount.

The next question, you do not answer unless you have answered the first two questions yes and have put in an amount.

Fourth question. Was Collier negligent in failing to provide safe scaffolding for the work on the canopy fascia?

Your answer to these questions must, as I say, not be disclosed to anyone before you deliver them orally in the courtroom in response to the question of the Clerk of the Courts. If you wish to communicate with the Court, do so in writing, using the Foreman, Juror Number One, as your intermediary and representative. Notify the marshal when you have any such communication.

There will be a short recess during which counsel will review the charge with me to make certain that nothing has been omitted or misspoken. Then you will retire to the jury room to deliberate your verdict. Please don't start deliberating yet because the alternates are still with you and they are about to be excluded from the jury. You will be excused now.

(V-250) (Jury left the courtroom.)

Mr. Fetell: On behalf of the defendant, Worthman Housing Associates, I have no requests to charge other than those previously requested and with respect to the Court's ruling on that I renew the exceptions taken at the time.

With respect to the charge as given, the defendant Worthman renews all exceptions previously taken as

stated to the Court and placed on the record and repeats and reiterates as if I repeated them at this time.

The Court: In other words, you are repeating now as exceptions to the charge that are given all those exceptions which you noted in the discussion of instructions on the charge before it was given?

Mr. Fetell: That is correct.

Mr. Baklor: If I may, I would also like to renew all the exceptions to the charge which I had made previously, the discussion prior to the time of summation, and also renew the exception to the request of charge which was not given, the request that I made which I mentioned prior to summation.

One other thing I bring up is something that was overlooked and it's sort of a slight inconsistency. (V-251) When going through the charge prior to charging the jury, we agreed to add the language which was added, that if Collier is found liable to Worthman, Collier should be liable for the entire amount which was added; but I did note when I heard—

The Court: Yes, that is right.

Mr. Baklor: That is on Page 5, which would be consistent with the original charge and I believe that should also be changed.

Mr. Fetell: Yes, I see that.

Mr. Baklor: So I think that should be clarified to the jury so they know which way they are going.

The Court: All right.

Mr. Baklor: Besides that, I have no further exceptions than the one just mentioned.

Mr. Segan: I would like to renew my objections to the charge that I had preivously stated on the record. I would like to add an exception to the present and I don't remember whether I stated this earlier, the portion of the charge which states the plywood boards atop

the canopy as described in the evidence constituted scaffolding as a matter of law if they were and that is the part that I except to, Your Honor. At the direction or permission of (V-252) Worthman's superintendent used by plaintiff to stand on while he worked at affixing the fascia to the canopy or if they were before December 18, 1972, used by Worthman, or by other trades to stand on while working at the direction or with the permission of Worthman's superintendent.

I except to it in its entirety and then I except to break it down to the particular and that being the portion that is the portion that just says at the direction or permission with Worthman's superintendent used by plaintiff. That I except to.

The Court: You do except to both?

Mr. Segan: Yes, but—

The Court: A little more emphatically?

Mr. Segan: I am afraid since there is so much contemplating of record—

The Court: You mean I have myself so haplessly tangled up?

Mr. Segan: I don't think so, I happen to like some of the things that you said, in fact, most of it. I do except to the special verdict. I did say that before.

The Court: No, you didn't.

Mr. Segan: I probably should have.

(V-253) The Court: That I am afraid is a matter in my discretion.

Mr. Segan: I understand that, Your Honor.

The Court: The reason for it, because I don't—I have only started using that recently. I think that under the new longshoreman law it is getting so complicated on these questions and I think we are all going to get in practice, because all of our cases will be comparatively negligent cases, so we might as well get used to it.

Charge

The reason I want a special verdict in the hope for example, if I am wrong, about Collier's liability, and you're right, we don't have to try the case over again.

Mr. Segan: All right, Your Honor, as a matter of record, I renew my request that I submitted to you earlier in the language as requested.

The Court: I think I have charged the substance of them and I like my way of doing it better than yours.

Mr. Segan: I take exception to that.

(Jury entered the courtroom.)

The Court: Ladies and gentlemen of the jury, there will be no further instructions.

(Whereupon the Marshal was sworn by the Clerk (V-254) of the Court.)

The Court: You will now retire to consider your verdict and from now until the time you reach your verdict, you will be in the custody of the United States Marshal. If you don't reach a verdict by 5:30, then I will send you home.

(Jury left the courtroom.)

The Court: I want to thank you very much for your patience at the trial, and I am now speaking to the two alternates.

(Whereupon the two alternates left the courtroom.)

The Court: Will you please bring the jury back in.

(Jury entered the courtroom.)

The Court: This will only take a moment, ladies and gentlemen of the jury, because I forgot to charge something.

You remember when I was explaining to you the two claims, plaintiff's claim against Worthman and then Worthman's claim over against Collier, I misspoke myself. The Worthman claim over against Collier is based on a claim that Collier is liable for all of the damages that may be awarded to the plaintiff against Worthman.

Charge

Now, remember counsel said this (V-255) is 100% case, that is the idea. I misspoke myself in the first reading.

All right, you may leave the courtroom.

(Whereupon at 4:25 P.M. the jury left the courtroom to begin its deliberations.)

(Whereupon Court recessed.)

Court Clerk: Case on trial.

The Court: Gentlemen, I don't think we can expect the jury to reach a verdict by today. I am going to call them in and tell them to come back on Monday morning.

Mr. Segan: That is fine.

The Court: I will have them come back to this courtroom. We are starting another case, but I will start that one in Judge Judds courtroom across the hall.

Bring the jury in.

(Whereupon at 5:30 P.M. the jury entered the courtroom.)

The Court: I think, members of the jury, that you have not arrived at a verdict and since it is 5:30, I think this will be a good time for us to part until Monday morning.

I should like to tell you that you are not to discuss this case with anyone during the weekend. (V-256) Have a good weekend.

(Whereupon jury left the courtroom.)

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(VI-257) April 11, 1977

(VI-259) Court Clerk: Case on trial, Ralph McKechnie against Worthman Housing Associates and Collyer Associates.

The Court: Gentlemen, there is a message from the jury that they have reached a verdict.

Please mark this Court Exhibit Number Three.

(Whereupon message from the jury was marked Court Exhibit Number Three.)

The Court: Bring the jury in.

(Jury entered the courtroom.)

The Court: Members of the jury, we have received your message.

The clerk will now take the verdict from the jury.

Court Clerk: Madam Foreman, will you please rise:

Mr. Foreman, Ladies and Gentlemen of the Jury, as to Number One, was the plywood board on the canopy used as a scaffold by plaintiff at the direction or with the permisison of Worthman, what is your verdict?

The Foreman: Yes.

Court Clerk: Second question, did the plaintiff fall from the canopy because of the inadequacy of the plywood board as a scaffolding? What is your answer?

The Foreman: Yes.

Court Clerk: Third, what was the amount of (VI-260) plaintiff's damages resulting from the accident?

The Foreman: $260,000.

Court Clerk: Number Four, was Collyer negligent in failing to provide safe scaffolding for the work on the canopy fascia?

The Foreman: No.

Court Clerk: You say your answer to question number one is yes, question number two yes, question number

three $260,000 and question four no, and so say you all?

The Foreman: Yes.

The Court: Do you want the jury polled?

Mr. Fetell: Yes, Your Honor.

Court Clerk: Mr. Foreman, Ladies and Gentlemen of the Jury, you have rendered your verdict as to question number one, was the plywood board on the canopy used as a scaffold by plaintiff at the direction or with the permission of Worthman, you answer that yes.

Question number two, did the plaintiff fall from the canopy because of the inadequacy of the plywood board as a scaffolding, your answer was yes.

Question three, what was the amount of plaintiff's damages resulting from the accident, you say $260,000. (VI-261) Question number four, was Collyer negligent in failing to provide safe scaffolding for the work on the canopy fascia, you answer no.

Are those your answers, Juror Number One?

Juror Number One: Yes.

Court Clerk: Are those your answers, Juror Number Two?

Juror Number Two: Yes.

Court Clerk: Are those your answers, Juror Number Three?

Juror Number Three: Yes.

Court Clerk: Are those your answers, Juror Number Four?

Juror Number Four: Yes.

Court Clerk: Are those your answers, Juror Number Five?

Juror Number Five: Yes.

Court Clerk: Were those your answers, Juror Number Six?

Juror Number Six: Yes.

Court Clerk: The jury has been polled, Your Honor.

The Court: All right, I want to thank you very much for your patience at this trial and speaking for (VI-262) all three counsel I can say for them they too thank you very much.

(Jury left the courtroom.)

Mr. Fetell: Your Honor, I don't want to make motions now because I know you are engaged in a trial and the complexity is such that I don't feel I should take the time of the Court.

For the record now, it is the intention of Worthman Housing Associates to make the appropriate motions for judgment and I request time to do it on appropriate set of papers with supporting memoranda of law and I would ask—

The Court: You will have ten days from the day of judgment which will be probably today or tomorrow. If you have any problems at that time call me and call the plaintiff's counsel and the other counsel telling me what date you agree on if you have agreed on any, tell me why you have agreed on it.

Mr. Fetell: Tentatively, when I get back to the office I will find out whether I will be out next week for personal reasons.

I would ask Your Honor to entertain a stay of (VI-263) execution until such time.

The Court: Yes, I will stay it.

Colloquy *re* Requests to Charge.

(3.194) Mr. Bakalor: Without going into various other things, there is one clear thing I would like to quickly bring to your Honor's attention.

The Court: Yes.

Mr. Bakalor: Over and above other exceptions I would have to the charge, on page 15 of the revision, the thing that bothers me—and obviously I am happier with the revision than I was with the original—

The Court: And you're still not happy.

Mr. Bakalor: No.

But that which still bothers me is you seem (3.195) to be charging the employer is obligated to provide a safe place to work for his employees, and I have no disagreement with that.

And a safe place to work is pure codification of the common law based on negligence. And when you come down to page 15 you state in my opinion, if the scaffold turns out not to be safe as far as the jury is concerned, then automatically we have violated providing a safe place to work.

And it's my opinion the line of cases under the codification of the common law, even if the scaffold is not safe, you have to show the employer should have known or knew. And it's a negligence violation now, and therefore I think you have to—I mean should charge exactly what a safe place to work means, your Honor; which is basically whether or not we were negligent.

Because if we are not negligent, we are out even if the scaffolding was unsafe.

Mr. Segan: I think it can be remedied by saying they had to provide a safe scaffold.

The Court: I think his work on making it a safe scaffold and showing Mr. McKechnie how safely he discharged his foreman's duties was (3.196) good art. He was kind of rough on you, though.

Mr. Segan: He made me a little scared, Judge.

Mr. Fetell: What else could he do?

The Court: I think from plaintiff's point of view his feelings is he didn't have to do it that beautifully.

Mr. Fetell: The last argument will fall under the Mortensen concept.

The Court: This admiralty concept is that the longshoreman's own negligence to do the bridging for the stevedore, I don't think I have ever seen a state negligence case that said that.

Mr. Fetell: If I ever said Mortensen in the State Court, they wouldn't know what I am talking about.

The Court: They may have had it—

Mr. Fetell: They don't have it any more, Judge.

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(3.197) Mr. Bakalor: To my chagrin, when I went back to my office I found out Mortensen was my partner's case and he wasn't my partner at that time. I never do that.

Mr. Fetell: All the State Court has to do, your Honor, is go back to the seaworthiness cases, and all the work is done in the maritime law. And they wish to rewrite law themselves. And if I cite maritime law, they say it's Federal Court stuff and we are not bound by it.

The Court: They are certainly not bound by (3.197A) it.

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(4-87) The Court: I do not think that the kind of work here involved is the kind of work that could possibly exonerate the owner of the property from providing a scaffolding, in order to make it assent to do the job.

Now, there can be other kinds of machinery and we are all familiar with the machines that are used, buckets and other machines that are used, for (4-88) example, by the maintenance people, by the telephone/telegraph company to get to height and this is a modest height, and almost

anything you use would have to be conceptually be a scaffold or its equivalent. So here we are talking then about that part of the work which could, of course, by contract, be between Collyer and Worthman be made to be responsibility of Collyer as probably it was here, but that was of no concern to McKechnie and Section 240, or that is involved therein, simply to be sure that such an undertaking, such a delegation of responsibility is legal, and the more recent cases indicate that, with reluctance, such convenants, working both ways, either as indemnification or armed in their own four corners are valid, but they do not discharge the statutory responsibility owed to these persons who are the beneficiaries of the statute.

On these grounds, I deny the motion.

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Colloquy *re* Requests to Charge.

(4-169) Mr. Bakalor: Your Honor, at this time, I notice Mr. Fetell has rested his case as a defendant and I presume the third party plaintiff—

Mr. Fetell: Yes.

The Court: Subject to the stipulations.

Mr. Bakalor: The stipulations would be on my case as

Mr. Bakalor: The stipulations would be on my case as a third party defendant. What I am saying, at this time, your Honor, I think it would be my position that I would desire to make a motion to dismiss the third party plaintiff case for failure to make out a prima facie case.

The Court: And a motion for a directed verdict on the claim over?

Mr. Bakalor: Yes, sir.

Colloquy re Requests to Charge

My inquiry is whether you want us to do that the first thing in the morning or prefer us to do it right now? Nothing will really change on the third party defendant's case. We could stipulate it and reserve on the motions for tomorrow. Whatever your Honor prefers.

(4-170) Mr. Fetell: What we are going to stipulate is the contract of Beach Haven/Worthman and the stipulation as to who got paid.

Essentially what we are going to do now is I will concede having seen certain documents, that if Mr. Bakalor called a witness from Collyer, he would testify as follows: Collyer received from my people, I'm putting it in those terms, a letter—I'm sorry, a contract and that contract was between—contracted Beach Haven Builders and Collyer Associates, Inc. And that—

The Court: Beach Haven Associates or Beach Haven Builders?

Mr. Fetell: Builders.

The Court: There is one thing we do want to get. There isn't any doubt that Worthman is a New York corporation and its principal and only place of business—there are no other places of business other than New York, are there?

Mr. Segan: The pleadings didn't admit.

Mr. Fetell: That's the diversity suit. I will concede it, Mr. Segan, yes we do. I made a concession. Don't worry about it.

The Court: I don't think there is any other statement.

(4-171) Mr. Segan: I thought there was an admission.

The Court: Where is Collyer's principal place of business?

Mr. Bakalor: Manhattan; I presume it's a New York corporation.

Mr. Fetell: That's appended under the third party claims.

Colloquy re Requests to Charge

The Court: It doesn't matter, really.

Mr. Fetell: I am prepared to stipulate further that if this witness were called, that under the date of September 21, 1972, Collyer Associates returned the signed contract and the letter was addressed to Beach Haven Builders.

The Court: At 200—

Mr. Fetell: 550 Old Country Road, Hicksville, which is the address of Beach Haven and Worthman.

Thereafter, Collyer Associates, Inc., sent its invoices for services to Beach Haven Builders, in connection with this project, and that was a consistent pattern of billing and that Collyer—presumably pursuant to Collyer's instructions, shipments were made to Collyer, care of Beach Haven Builders, in New Rochelle, New York, by Collyer suppliers, and that—I don't know what this is.

Mr. Bakalor: The books were kept—

(4-172) Mr. Fetell: That Collyer kept its books of accounting under the name, purchase of Beach Haven Builders, 550 Old Country Road, and written under the billing sheet of Mr. Wohl Worthman, and that further, all the payments received by Collyer for work invoiced and performed under this agreement were by check, issued on the account of and with the logo of Worthman Housing Associates, Inc., and that no payments were ever made by the Beach Haven Builders, and that under normal circumstances, I would admit, he would so testify, without conceding the truth thereof, but I am willing to go so far that I have absolute reason to believe that is probably the correct state of facts.

Mr. Bakalor: I would like, for the record, to offer the various documents as one package, one exhibit—the documents he is talking about.

The Court: O. K.

Colloquy re Requests to Charge

Mr. Fetell: What we don't have in there is the payments, so if the jury looks at it, it will have to be supplemented.

Mr. Bakalor: I have copies of the checks.

Mr. Fetell: Fine.

Mr. Segan: While the exhibit is being made up for marking, may I also say, the witness who was produced happens to have been, I believe, the (4-173) treasurer and paymaster of the corporation Collyer—his name was Mr. Farley and I was anticipating his testimony and I was going to reconfirm, not through the figures, but clearly to say that the records that were presented by Mr. Lamo were bids and also given to him by Mr. Farley. Will you accept that, gentlemen?

Mr. Bakalor: Absolutely. You have the record.

Mr. Fetell: I have no knowledge of it at all.

Mr. Bakalor: I have two of the checks and the third w . a promissory note, eventually, $20,000.

Mr. Fetell: We have a documentation and we can add that to the pile of exhibits.

The Court: What exhibit is it?

The Clerk: Third party defendant's Exhibit L.

Mr. Bakalor: I will put them in a package for you. There is one comment in these exhibits and that is toward Travelers Insurance.

Mr. Fetell: I would hope it goes out. We can't tell—

Mr. Segan: I did hear from you off the record before that you would agree that the records that were produced were authentic records of Collyer?

Mr. Fetell: The two sheets?

Mr. Segan: The sheets and W-2 forms.

Mr. Fetell: The payroll records I have no (4-174) problem at all. I will admit as to the regularity on them.

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Colloquy re Requests to Charge

Mr. Bakalor: Your Honor, at this point I would like to move both to have the third party plaintiff's complaint dismissed for failure to make out a prima facie case, and also for a directed verdict on various grounds.

(4-175) The first ground solely deals with the contractual claim and that the evidence is clear that the contract was solely with Beach Haven Builders.

Mr. Russo said there was an entity in addition to Beach Haven Associates, Inc., called Beach Haven Associates, Inc. It is our contention that when you enter in a contract to indemnify one party, even though another party comes along and takes over the job, there is no legal obligation, contractual obligation, to indemnify the parties.

On that first ground, I move to dismiss solely the contractual claim over it.

On the second portion of the motion, again it dealt with, again solely the contractual claim over it. I move to dismiss that contractual claim on the grounds that on our view of the New York law, even following Shell versus Levine Oil, and the Kurak case, that this contract does not evince an unmistakable intent to indemnify the third party defendant, such as the circumstances, such as where the alleged defect that caused the accident was caused solely by the affirmative creation of an improper scaffold, if you buy the plaintiff's case.

Obviously, if the plaintiff doesn't prove a scaffold—

(4-176) The Court: Up to this point, that's the only case.

Mr. Bakalor: Third party plaintiff, through its own men, admittedly so created the condition and then gave permission or acquiescence, if not direction, to the employees of the third party defendant to go upon this creation to do its work, where in the contract it does give the third party defendant the right to use the equipment of the contractor, when the contractor so agrees.

Colloquy re Requests to Charge

I understand there are portions of the contract saying that we are to provide for scaffold, but obviously not necessarily so when a third party plaintiff allows us to use equipment.

Without belaboring the point, this contract does evince an unmistakable intent to indemnify under the circumstances of this case and to that direction, I cite the Judlak case, which I have submitted to the Court in my first brief, which frankly, when I first saw the case, thought they would allow indemnity whether they didn't allow indemnity in that case. That of course is only a—it's to be argued on May 4th with the Court of Appeals. We don't know what the Court will do with it.

The Lopez case in the brief I gave to the (4-177) Court this morning, on the case of Lopez versus Con Edison, we have a similar case at the bar where the person injured was a third party defendant's employee. The defendant conceded he had violated Section 200 of the Labor Law.

Where the indemnity contract talks about third party defendant having to indemnify if the accident is caused by any act or omission—not even a negligent act or omission.

I must say again in candor with the Court, in that context, it says whole and in part and our contract has additional detail.

In any event, in that case, Con Ed was held liable and the third party defendant's action was dismissed by the trial judge and that dismissal was affirmed in the Appellate Term, the Appellate Division and the Court of Appeals four-three in the Court of Appeals, but it was so affirmed, and I think—and in the Court of Appeals affirmance, the majority decision which was very interesting said, in making its decision, their decision was basically the third party defendant wasn't negligent and

therefore the indemnity agreement doesn't require indemnification.

What they did say, they specifically said they were not deciding whether or not this contract even evinced an unmistakable intent to indemnify under the (4-178) circumstances, and I submit under the particular facts of this particular case, this contract has not so evinced unmistakable intent.

Leaving the contractual points for the moment, and going into the reason for a complete dismissal of the entire case, this includes the Dole v. Dowd claim, which would only become important if the contractual claim were to drop by itself.

The contractual claim remains by itself. It takes precedence.

Also the claim that there has been proof of negligence, under the particular facts of this case, there can be no finding of a breach of the employer's duty and thus no violation, no commission of negligence.

If we start with the proposition that to indemnify under that contract, you must find negligence, to find negligence, there must be a breach of duty, and the breach of duty is not the breach of the third party plaintiff but to the plaintiff. That is where the breach of the duty would have to lie.

To find a breach of—

The Court: You are clear on that. That is not talking about breach of duty owed to the general contractor but owed to the plaintiff?

Mr. Bakalor: Yes. Thus we have to see what (4-179) duty the employer owes to the employee.

Now, I believe that that duty is solely a commonlaw duty as codified by Section 200 of the Labor Law and the case, including the Court of Appeals cases which I have cited in my last brief in the claim against Stude-

baker, another case in the Court of Appeals. They are clear, the only duty they are not talking about is contributory negligence.

The employer only owes a duty to the employee from hidden dangers, those dangers the employee himself did not, should not recognize, which the employer should recognize.

If that be the case, the only person really whose negligence would be attributable to us in this case, if any, the negligence would be that of the employee, Mr. McKechnie. The argument runs like a circle, but if Mr. McKechnie was negligent, so we could be negligent. That would mean that he knew or should have known the scaffold was unsafe.

If he knew or should have known it was unsafe, we knew.

What happens at that point, once Mr. McKechnie knew or should have known that it was unsafe, we no longer have to protect him from hidden danger because it's not hidden, and thus, under the facts of this particular case, where the negligence was attempted to (4-180) be attributable to us, to that of the injured party, there cannot be any breach of duty.

The Court: In other words, you are saying the only basis on which we could be found to be negligent would be on the ground on which the negligence would be patent?

Mr. Bakalor: Yes, sir.

The Court: That's not within the range of the duties owed by an employer to an employee?

Mr. Bakalor: Yes, sir. That's basically—precisely the argument. Where I distinguish it from the situation where if Mr. Velasca, let us say, was the injured party or a laborer was the injured party or perhaps the jury could say the foreman, Mr. McKechnie, because of his

intelligence, age, experience, he should have known but really perhaps this was a hidden danger to the laborer.

The Court: Velasca?

Mr. Bakalor: For the sake of argument, maybe you can say—perhaps it's stretching that, maybe an employer under those circumstances knew or should have known of the danger which was hidden to Mr. Velasca, but under the circumstances of this case, the knowledge of the employee, Mr. McKechnie, is being attributed to the employer. Whatever one knew, the (4-181) other knew.

If it's hidden to one, it's hidden to the other. If it's patent to one, it's patent to another. Therefore, there would be no breach of a duty.

Based on that, the third party plaintiff has failed to make a case against the third party defendant.

Mr. Fetell: Ingenious but inconsistent.

The Court: He's a good lawyer.

Mr. Fetell: Absolutely. No question about it.

First of all, let me get to the patent aspect. This is not the case of a collapsing situation.

The violation which Worthman allegedly is guilty of was failure to provide a scaffold that meets code. Now, code requires railings, et cetera, et cetera, et cetera. To the extent that it is an improper scaffold, it is patent as all get out. If it's a scaffold, *arguendo,* and if it's the fact.

So, the patent argument really simply doesn't hold water here. We don't have to get to that.

The form of indemnifications that are running loose in the construction industry in the United States would make one's hair stand on end. Every time a lawyer represents a general contractor, they have been writing all kinds of weird indemnifications.

(4-182) It got so bad the Court of Appeals found itself upholding—the Appellate Division in Kelly against Car-

isto, the following: You will indemnify me, Mr. Subcontractor, if I am side by side with anybody on the job, regardless of who causes the accident, and that while indemnification was upheld until the legislature couldn't stand anymore.

That was the one that your Honor alluded to earlier, I think maybe even off the record.

There is one form on indemnifying which violates public policy. You indemnify me even though you are not on the job. It has nothing to do with your work.

All other indemnifications have been sustained in the State Court.

Now, with that in mind, the at bar is not one of those that an attorney whipped together. This is a standard A.I.A. indemnification, which is probably used more than any other.

It says, for loss arising out of or resulting from the performance. It has nothing to do with the culpability for the moment, even though we can show culpability.

I just want to get to the very language itself.

It certainly arose out of the work, there has been no accident, had it not been the very work (4-183) Collyer was doing and Collyer's employee. It's, if you will, establishing an argument with semantics arising out of it and certainly resulting from the performance of it.

On that ground alone, absent a showing that it violates that public policy, even though I think this one may and the date of the change we don't have to get into. Let's get to other parts.

I don't understand Mr. Bakalor's argument that Mr. McKechnie's actions depend on whether Mr. McKechnie was the target of the accident or Mr. Velasca was. Both of those gentlemen—

The Court: His argument there was that the accident, that the risk could have been patent and disclosed to

Mr. McKechnie, who was the foreman on the job, as between the two men, and yet be a patent on the disclosed defect as to Velasca, so that if Mr. McKechnie hadn't gone up on top and knew that it was a dangerous scaffold and nevertheless let Velasca come up, Velasca might have a complaint.

Mr. Fetell: If that was a scaffold, it violated the regulations. It had no railing. It was more than 5 feet off the ground.

If that were a scaffold, it absolutely, on its face, violated the law.

I am not conceding it was a scaffold. If it (4-184) was a scaffold, I will not argue it wasn't a violation. It had no railings on it.

On its face, it simply violated it in that respect, but that isn't where we are going now.

It was Mr. McKechnie who fell and that's under Spondi—

The Court: I think what Mr. Bakalor's argument then becomes is, you say that this was obviously a defective scaffold. There is no claim because Collyer owed no duty to, no safe place to work, a duty under 200 and 241 and subsection, to its own employees at commonlaw or elsewhere and Section 200 also rings in the code, because its duty is only to protect its men against what is not out there, because they are all in the business together. That would be the rationalization.

Mr. Fetell: I have no trouble with that argument.

The Court: So, it's only where the employer knows, the employee doesn't know that it creates a risk, that there is a breach of duty from a employer to employee. He hands him the tools and says here, this is a U. L. tested tool. You can use it with safety. The man starts to use it and he gets shocked and killed.

They should never have given him such a tool with (4-185) a fake U. L. label on it.

Here he says no, because here what was wrong was that, at least obvious to McKechnie, and even to Velasca, as you see, to the president of Collyer. All of them. There was no breach of duty to anybody because everybody was busy slitting its own throat.

Mr. Fetell: The argument that Collyer owed no Section 200 duty to—

The Court: Mortonson was the law of the land.

Mr. Fetell: More so than that. It's even worse than that. He is saying that since the employer owed no duty, he could owe no duty to Worthman. It did owe a duty to Worthman and not by an operation of law.

The Court: Here, this part you are talking about something quite else. Where he gets back into the covenant is by saying, the covenant has two parts. There is nothing wrong with that.

It does apply to this transaction but it's a twofold test, but first it must apply the transaction and second, the transaction must be one in which liability has been imposed on you, because of concurrent negligence of Collyer.

That is where he says the rub comes, but Collyer is only negligent if that is breached duty. (4-186) It did not have to be a duty to Worthman because that's another matter entirely.

It breached a duty to its employee, but it didn't breach a duty to its employee because he argues under New York law, the employer owes a common-law and Section 200 duty to its employee only to protect them against the obvious.

Mr. Fetell: What makes that ingenious is this, your Honor.

The Court: All I wanted to know is: Is that New York law?

Mr. Fetell: No. I am staying away from Mortonson.

The Court: What he said was he has three Court of Appeals cases.

Mr. Fetell: He doesn't.

Mr. Bakalor: I do.

Mr. Fetell: Absent the contract of indemnity—

The Court: That's all I wanted to know. Is he right or wrong?

Mr. Fetell: Collyer can be negligent with impunity to its employee because it says I owe you no duty. You can sue him. I will stay with counsel's argument.

I owe you no duty and absent the contract—

The Court: What I want to know is whether they (4-187) owe him no duty other than to protect him against a hidden risk.

Mr. Fetell: The answer to that, it is not the law for this reason. Compensation is a suit bar—

The Court: I don't understand the expression.

Mr. Fetell: I am coming back. The obligation to provide a safe place to work addresses itself to anyone in control. He cited Wolfrohn. It stood on the following proposition, that an owner out of control could not be held responsible to provide a safe place to work and an owner in control could. That was the proposition. An employer always owes a duty to his employees to provide them a safe place to work.

The only reason there are no cases is because there is a suit bar. He is precluded from suing him because of the Workmen's Compensation statute.

If the employer fails to carry compensation coverage, he can sue. What I am saying is that to state an employer owes no duty is totally unsupportable.

The Court: I think that may have been true before Dole against Dowd. The Workmen's Compensation never said an employer owes no duty to his employee. It said

rather that it is an irrelevance. The (4-188) employer is liable to the limits set by the Workmen's Compensation statute and has it for employment of any injury an employee sustains, whether or not there was a breach of duty, but that doesn't mean that there are no breaches in duty because we know that occurs, because when the breach of duty is to extreme, there is no Workmen's Compensation feeling.

In other words, if the employer is the only one negligent towards an employee, he is liable.

Mr. Fetell: That's a different area. The cause of action, the obligation is the same to the employer as it is to others.

The Court: But there was one case. What was the case that followed Dole against Dowd in which they argued very strenuously, I guess R. E.: Green.

Mr. Bakalor: All the time.

The Court: They argued that if you have the Workmen's Compensation suit bar, that protects against Dole and Dowd too and it scratched its head and said no. No, it doesn't, and that's not true and in a lot of other states.

Mr. Bakalor: In Green, there is that case in the First Department, Third Department and Fourth Department.

Mr. Fetell: You know who won it. Mr. Kramer (4-189) beat me on that because he represented the Government in Galemo. The Government was the employer and can't be brought as a third party defendant. I lost that in the Court of Appeals after strenuous argument but the question was put to me by Judge Gurfein on that argument. Are there any cases that it is available to the state side employer. I didn't want to mention Green's name.

For years it has been rejected.

The Court: In New York.

Mr. Fetell: Certainly in New York.

Colloquy re Requests to Charge

The Court: And in the Second Circuit.

Mr. Fetell: Apart from the Government, yes.

The Court: That's because it is a highly special statute—

Mr. Fetell: Bad law.

The Court: Yes, the longshoremen case, it worked until the most recent change when they expressly ruled on that.

Mr. Fetell: I go back to the proposition that Collyer does owe a safe place to work to its employees and any argument—

Mr. Bakalor: I agree with that.

Mr. Fetell: He agrees?

Mr. Bakalor: Absolutely.

The Court: Safe place to work means safe in (4-190) the sense that it contains no latent menace. If the menace is patent, then says he, the safe place to work, duty is sufficiently discharged.

Mr. Fetell: Does anyone have a copy of the statute here? If anyone has a copy of 200 or 241, because it says "shall furnish." It says, "shall furnish" and failure to furnish safe equipment is a tort. Now, the trouble is you can't sue your employer for that tort. That's a tort I'm being sued here for here. Failure to furnish a proper scaffold to Mr. McKechnie, and I have a contract that says if my tort arises out of your work, then you'll indemnify me.

The Court: You have two things here and that is the second aspect of it and this I'd up with the contract question and I will get back to it in a minute, that you agreed to furnish your own scaffold, if you are bound to in the general condition.

Mr. Bakalor: We did so agree but we could use their equipment at their discretion.

Colloquy re Requests to Charge

The Court: I would say here, there you can then argue you failed to furnish your own scaffolding in the situation in which you elected, through your foreman on the job, to use an unsafe scaffold, rather than to furnish your own safe scaffold. That's (4-191) another twist on it.

Mr. Fetell: And put me in peril.

Mr. Bakalor: That would be a question of duty.

The Court: We will resume discussion tomorrow morning. I think I would like to have it both ways on that, but as long as you are clear that you got it solidly on the record that—

Mr. Fetell: We do agree on this. If we reserve the third party suit, Judge Dooling—

Mr. Bakalor: That's a separate story.

Mr. Fetell: And adopt the jury's findings—

The Court: The other thing is I'm inclined to think that I probably have to decide the contract point as a matter of law. I'm not sure.

Mr. Bakalor: The point I am raising now—

The Court: No, no. The question whether or not they are the contracting party, I think that's the question of law. I'm not sure. I think it is.

Mr. Bakalor: Frankly, I'm not sure. I think it is, too. I don't know what facts the jury will decide. It either inures to their benefit or it doesn't. There is no dispute as to the facts.

The Court: That's what bothers me on that one, and I rather think it's one of those crazy things that may turn on something as simply as if they didn't put Inc. West Haven Builders. Therefore, they can't (4-192) say to you that that's the corporate contract binding on and similarly on a similarly named corporation, when they would be excluded from showing anything except that it was Worthman that made the contract with the municipality. Worthman paid all the men on the job, paid all the bills, and was directing the work.

Colloquy re Requests to Charge

Mr. Fetell: And the stenographer made a mistake.

The Court: Looking at it the other way around, it's sort of like saying if they are estopped to deny they were a party to the contract, isn't Collyer in a way stopped to deny that they accepted the direction and their money and they bring them to make them perform their contract. I don't know.

Mr. Fetell: 10 o'clock, your Honor?

The Court: Yes.

(Thereupon, the above proceeding terminated at the time noted, 5:55 p.m.)

(5.3) The Court: The reason for the introduction of the ladder language is because I think, to everyone's surprise, judging by the memoranda thus far submitted, Mr. Cirto, who I think was quite an impressive witness, except on one point, in fact said that the proper implement here was ladders and not a scaffold.

Mr. Fetell: To perform the work?

The Court: To perform the work and the mention of work from the top of the ladder. The record also shows that these were approximately six and approximately eight foot ladders and that the canopy was approximately nine, ten, twelve feet off the ground. Nobody knows exactly how much.

Mr. Fetell: It was just high, half up the six foot ladder.

The Court: We don't know what step he was on.

Mr. Fetell: He said it was halfway up; it was just high.

The Court: That's not what he said.

Mr. Segan: The plans clearly state, from the concrete base to the top of the canopy, is (5.4) give or take ten feet three inches. That plan is in evidence.

Colloquy re Requests to Charge

The Court: Falasca said that you could not work with a drill or welding equipment from the top of the ladder but you had to apply lateral pressure. It seems to me that since ladders are specifically mentioned in 240 that there had to be something about ladders in, otherwise the defendant's argument that adequate ladders were supplied would be completely on—

Mr. Fetell: As I understood it, the plaintiff is not making any claim of defective ladders and that is the discussion we had the other day, in that Mr. Segan indicates that his sole approach in this case is inadequate scaffolding.

The Court: That's right.

Mr. Fetell: If the ladder comes in *sua sponte* it comes in. Where does it leave the plaintiff?

The Court: It leaves the plaintiff in the position in which he can hardly say the same thing, after a witness quite without anyone's (5.5) anticipation injects a new aspect of 240 into the case: To wit, the ladder aspect of Section 240.

Mr. Fetell: Your Honor, I analyze the importance of the ladder in the last couple of days discussion from a comment the Court had made as to whether the ladder was provided—put it this way: If Cirto contemplated that he was sending them up on to a scaffold, the significance of the ladder is that he was providing him with a means to get to the scaffold. That was the analysis that was made prior to his testimony, as a possibility.

The Court: That's what everybody had under discussion here, what everybody thought. Nobody, as far as I know, had earlier suggested in this case that the ladders were themselves the Section 240 equipment that the contractor was required to provide and which discharged his obligation under Section 240. When that comes up for the first time, it must be dealt with.

Mr. Fetell: Now, there is no claim, assuming that, following through, there is no (5.6) claim that the ladder was in violation of 240. It's covered by 240. Clearly, ladders are covered but there is no claim of a defective ladder.

The Court: I am just pointing out the evidence to you. We will go on with the charge. Let's not discuss it.

Mr. Fetell: All right.

The Court: I take it there is no objection to Page 1, 3 and 3B and 4 and 4A and 5?

Mr. Segan: That's going back to the original you mean, your Honor?

The Court: Yes, at the same time not be changed, at least not materially.

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(5.7) Mr. Segan: Your Honor, if I may be so bold, I have the original, I think where it is ending at 4A. You pick up at 12. Is that what you are doing?

The Court: No; five. There should be a five.

Mr. Segan: I got it.

The Court: Then 12. I made a change in 12. The ones you saw yesterday—

Mr. Segan: Oh, yes. I was going to ask about 12.

The Court: Come down to 12. I put the ladders in.

Mr. Segan: Yes, I have a question on 12, which I am very preoccupied with. I won't speak (5.8) about Mr. Fetell. He alluded to that.

Where you use the terminology, and the State Board of Standards and Appeals has the power to make rules to that end, it's just before you quote Section 240—

The Court: Yes.

Mr. Segan: I would respectfully request that instead of "to that end," to make rules to implement that duty. I

am a little bit fearful that we may start to border on suggestions of a duty imposed by the rules, which I most readily say, the rules, from at least my point of view, do not do.

The Court: Do not do what?

Mr. Segan: The rules do not create a duty. Only the statute or common law. To implement the duty, the rules were made. So, that we are all very clear, at least there be no ambiguity as to what was meant as to the power to make rules to implement that duty. Language to that effect, your Honor, rather than to that end.

The Court: He used the statutory rules to carry into the effect the provisions of the (5.9) labor law.

Mr. Fetell: I would agree with that. I will agree with Mr. Segan for the change and I would accept the one suggested by your Honor.

Mr. Segan: To carry into effect the labor law?

The Court: The provisions of the labor law.

Mr. Segan: Fine. Thank you.

Mr. O'Brien: Your Honor, if I may, on Page 12, I would like to take exception to that portion of the charge on Page 12 which refers to ladders, from my own—

The Court: When it refers to—

Mr. O'Brien: Ladders. My own personal view of the evidence, there is not sufficient evidence that a jury can determine that a ladder has anything to do with this particular accident.

The Court: I don't think so either, but the state of the evidence is that Falasca, at least, I don't think McKechnie testified about this, but Falasca said at least you couldn't work off the top of the ladder and it was not (5.10) there for an adequate implement. Then Mr. Cirto came along and testified that you should work off the ladder, that you couldn't work overhead from the canopy to fasten the fascia on the outside of the canopy

so that you would be doing a jackknife off the canopy, the whole time you were trying to work.

In that posture, I think what we have to do is to close the jury's speculation as to whether Cirto wasn't right, whether he shouldn't work off that by pointing out that if that's the point, if there is anything to what Cirto said, then the responsibility of the owner and general contractor was to supply such ladders for the work as would adequately protect the safety of those who were working on the task.

In other words, it comes up really as a reply to a defense proffered by Cirto's testimony.

Mr. Segan: Your Honor, may I make this observation, why I think that's very important?

The Court: In or out?

Mr. Segan: Should stay in.

The Court: All right, then at the moment (5.11) you don't need to persuade me.

Mr. Segan: What I meant was in the terms and context of the placement of a device to get up, provision for it. That's a very important provision of 240 and Cirto clearly acknowledged: "I knew the men had to work above the ground," when I asked him that.

Mr. O'Brien: Your Honor, I completely understand what your Honor has stated and as a matter of fact, I would acknowledge in summation, he could possibly argue that he could work from the ladder.

The Court: It will be.

Mr. O'Brien: My only reason for the exception to that is that, based on the evidence, number one, the accident didn't happen as he left the ladder to go on the plywood—

The Court: As far as this evidence goes—

Mr. O'Brien: That's what I am talking about.

Colloquy re Requests to Charge

The Court: The rest is speculation.

Mr. O'Brien: That's what I am getting at.

The Court: There was one question that (5.12) Mr. Fetell I think asked Cirto, saying you don't know whether he fell off the roof or off the ladder or what.

Mr. O'Brien: I asked that question.

The Court: He said no.

Mr. O'Brien: I definitely asked the question and he said no. As I say, to protect my record, under the state of this evidence, I would except to that portion.

The Court: After the charge is given, you should renew your exceptions to the charge and give those exceptions which you voiced in the course of this discussion. Don't forget.

Mr. O'Brien: Thank you, Your Honor.

Mr. Fetell: Your Honor, I started off with the proposition of not disagreeing with the Court on this, but only if this case is postured slightly differently.

If Mr. Segan were to make an application to the Court to conform the pleadings to the proof—

The Court: That's done automatically in the Federal Court. The case goes to the jury on the issues tried, with the consent of the (5.13) consent of the parties.

Mr. Fetell: If the case goes to the jury as follows: It is for the jurors to determine whether Worthman provided to the plaintiff—

The Court: Well, it's what I suggested, what is shown on Page 13; rewritten 13.

Mr. Segan: Yes, and might I say that I think that is absolutely proper and good law.

Mr. Fetell: In other words, if it's postured now that Worthman—

The Court: I am going to discuss this amply.

Mr. Fetell: I haven't had a chance to look at the revision with your prior proposed charge. How do I stand with respect to charging with a scaffold—

Colloquy re Requests to Charge

The Court: That's still in there. It's still a scaffold case. This is simply to take care of the sudden special defense of adequate ladders preferred mode.

Mr. Fetell: I believe it belongs in. I may disagree with your Honor on other points, as (5.14) long as it is in this fashion, I personally would suggest a charge where that is all included.

Did they provide those devices specified in Section 240, in the words of 240. I have no quarrel with that and I will wait a few moments and see how that shapes up with the other ones.

Standing by itself, I have no quarrel with it, because that's the language of the statute.

Mr. Segan: Are we at 12 yet?

The Court: Now we are moving over to 13.

Mr. Segan: May I make an observation on 13?

Of course my request did take that into consideration.

The Court: I think I have covered everything in your request in the form which I thought appropriate or not necessarily in the language that you chose.

Mr. Segan: I still have, your Honor, if I may be so bold, a quarrel with—not a quarrel, but a disagreement as to the language as follows: (5.15) Constituted—no. No, I'm sorry.

After constituted scaffolding as a matter of law, if they were, at the direction or with the permission of Worthman's superintendent, used by plaintiff, as his working platform. I will just take that first.

I think, in the posture of Cirto's testimony, now, your Honor, Cirto, I think we can go back to what you said in the very early part of this trial. Using Palsgraff and combining that with the evidence of the case, especially Cirto's testimony, Cirto said, I thought—

The Court: Let's not go into that, then the defense of contributory negligence raises its ugly head.

Colloquy re Requests to Charge

Mr. Segan: What I meant was, your Honor, is with regard to—

The Court: No, if it was an inadequate screen, then it was a 240 screen.

Mr. Segan: Screen? That's not what I meant.

The Court: It's a catch-all.

Mr. Segan: When Cirto said he could have (5.16) done it either way, from the canopy or the ladder, therefore it was foreseeable. He should have known. He knew or should have known.

The Court: That is for you to argue. I won't charge it.

Mr. Fetell: If your Honor please, one word on Page 13?

The Court: Quick.

Mr. Fetell: The word acknowledge, used by Worthman or by other trades as a working platform, with the knowledge, if your Honor would delete knowledge and substitute the same words you used above, at the direction or permission of Worthman, there would be a consistency there and he would have no quarrel with that.

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(5.17) The Court: Mr. Bakalor.

Mr. Fetell: Yes, your Honor.

I have three exceptions on Page 13, your (5.18) Honor, starting from the bottom up. I again except to putting ladders into the charge, which we have just previously discussed.

The Court: Yes.

Mr. Bakalor: In the middle of the page I except to that portion of the charge where you tell the jury that they can hold it to be a scaffold, if they found that Worthman's employees used it as a working platform without explaining to the jury the definition of a working platform.

Colloquy re Requests to Charge

And the reason I say it is this: There is no question that it's agreed upon the Worthman laborers went up there and worked on the platform to clean it. I don't think that makes it a working platform. And if I am wrong about that, I am wrong about the exception. And the jury, having no knowledge of the Labor Law, would say there is no question people were working on it and it's a working platform.

I have no exception to the charge, if it's explained to the jury that Worthman's people were up there working above, cleaning it, then it's considered a working platform. But I (5.19) don't think the jury would know what a working platform is and would come to the wrong conclusion for the wrong reasons, unless they are told.

The Court: That would cut a little deeper because then you would say two or three lines above, used by plaintiff to stand on while he worked, or, if they were used by Worthman or other trades to do work with the permission.

Mr. Bakalor: What I would like to be put in there is over and above cleaning the platform.

Mr. Segan: I feel it's improper. There is a lot of evidence in there about somebody handing things through—

The Court: They may not, by that. They may by the other evidence only.

In other words, Cirto did not adopt the idea they were used in the past, too. He simply said he could not swear that it was never used for that purpose. He didn't claim to have watched it every moment of time.

Mr. Bakalor: All I am saying to your Honor is this: If it could be explained to the (5.20) jury—and obviously not in these words—that the only use of the knowledge of Worthman is that it was plywood and people were sent up there to clean the plywood, and that's a working platform.

Mr. Fetell: I agree with that.

Mr. Segan: I except to it.

Any site used by people to prepare their work—let me say this to establish a contrast: If Ferman Clark, whoever it was, stood on a ladder with a brush and swept off the debris, it's not a working platform. But once he stood on there to clean off the debris, he was using it as a working platform.

And so, therefore, I think the language should say, as the Court has placed it. Or perhaps, to say, to do any work off that area.

The Court: I suggest changing it up a little bit, four lines up above, used by the plaintiff to stand on while he worked at affixing the fascia to the canopy, or if they were before December 18th used by Worthman or other trades to stand on for working with the permission or at the direction of the—

(5.21) Mr. Fetell: I renew the argument made by Mr. Bakalor. Obviously Mr. Clark was standing there to clean.

The Court: Exactly.

Mr. Fetell: But to adopt Mr. Segan's arguments is saying a man standing on steel, it is a working platform.

The Court: Look at the Code. A man standing on steel, even if he is a steel worker, is supposed to be protected. He is supposed to have a safety net under him, or if there is steel above him he is supposed to have protection.

Any argument, that's the way it's going to be. You have your exception.

Mr. Fetell: I didn't get the spot. I was listening.

The Court: Now, after the quote at the top of the Page, fourth line, superintendent used by plaintiff to stand on—

Mr. Segan: Instead of saying as a working platform—

The Court: Do you see that in quotations there? Then the fourth line in the text below it, superintendent, used by plaintiff to stand (5.22) on while he works.

Then three lines above, two lines below, strike out as at the end of the line, and a working platform at the beginning of the next line, and then substitute.

Mr. Fetell: I have lost track.

Let me see, superintendent, used by plaintiff to stand on while—

The Court: No changes.

While he worked affixing the fascia to the canopy, or if they were before December 18th used by—it's all in there already.

Mr. Fetell: I understand.

The Court: By Worthman or by other trades—strike the next word, as. Strike the next three words, a working platform.

Mr. Segan: Yes.

The Court: Substitute, to stand on while working.

Mr. Segan: Okay.

Mr. Fetell: To which we will take an exception.

The Court: You except?

Mr. Fetell: Absolutely.

(5.23) Mr. Bakalor: Without further argument, for the same reasons I set forth previously, I except to that changed charge.

Mr. Segan: Is, with the, out, your Honor? I believe, with the—after working it will be with the permission.

The Court: Yes, with the permission or at the direction of Worthman's superintendent.

Mr. Bakalor: My last exception on Page 13, your Honor, is that I except to that portion of the charge which charges to the jury as a matter of law even if they found all these facts.

I think under New York Law I think it will be still a question of fact under the circumstances of this particular case as to whether or not this was or wasn't scaffold.

The Court: That's what I am stuck with.

Colloquy re Requests to Charge

Mr. Bakalor: I understand, but I except to that.

Mr. Fetell: Defendant Worthman excepts to the handwritten portion.

The Court: To the language beginning, in addition, and including, with the proper (5.24) protection to the plaintiffs and Falasca.

Mr. Fetell: Yes, sir.

The Court: In the transcript it won't be in handwriting.

Mr. Segan: 13(a), your Honor?

The Court: No changes in that.

Mr. Segan: Yes.

The Court: On Page 14 I put in because there is reference to it in the evidence, the rest of that phrase, for metal of equivalent strength.

And then we go on to the—

Mr. Bakalor: If I may, on Page 14, and actually at the end of Page 14(a), I except to all references in the charge to Rule 23.

The Court: Yes, that's pretty basic.

Mr. Fetell: It's not a 240 case, your Honor, which plaintiff's is solely, your Honor.

The Court: Yes. I want it perfectly clear my view of Section 240 is that these parts of the Code Rules which are relied on and quoted in the charge are drawn under 240, and (5.25) are properly charged.

Then you except to that?

Mr. Bakalor: Yes, I do.

Mr. Fetell: May I borrow 240 for a half a moment, because I want to refresh my recollection on one phrase.

Mr. Bakalor: In addition again, at the bottom of Page 13(a) and 14, I except to that portion of the charge and Rule 23 for another reason. And the reason I except to it is, for example, where you state the open side of all open scaffolds shall be provided with safety railings, et

cetera, and going back to 13(a), should be so constructed as to bear four times the maximum weight.

And taking the latter first, there is nothing in the case saying the plywood, although not complying with Rule 23, didn't bear the maximum weight because the plywood didn't break. And since the plywood was paper thin and didn't comply with Rule 23, it certainly didn't have anything to do—at least in my opinion—with this particular accident.

And thus you are sending to the jury a (5.26) question—

The Court: In other words, as I recall the evidence, the evidence—

Mr. Segan: The evidence is it slid, your Honor. There was no brake or buckling.

The Court: I am trying to see if it was in the negative, but I believe it was affirmative evidence there was no rupture of the plywood.

Mr. Segan: No question about it.

The Court: There is no question of the record being silent on that. The record is affirmative.

Mr. Bakalor: And thus I can't see how it has anything to do with the accident or this case.

Mr. Segan: I would just merely register any exception to the removal of the provision of the—from the charge, your Honor, because I can't make any further comment about it.

Mr. Fetell: The question, your Honor—

The Court: I think I will leave it in. We had evidence about—see, it's again the question of compliance with rules, and it's your (5.27) argument that Cirto prevented himself as a person who had been vigilant in compliance with rules. And here is a rule he obviously didn't comply with and knew he had not complied with and relied on a clearance from the factory inspector.

Mr. Segan: Let me say this: I think later on in the charge—

Mr. Fetell: State Inspector, your Honor.

The Court: Yes, State Labor Department Inspector.

Mr. Segan: Certainly you do refer to the fact that—there are proximate clauses referred to that the particular defect had to be the one who caused him to go off the canopy. And that's why the jury—this generic distinction—by the way, the wind never did appear.

Mr. Fetell: On that day.

The Court: In the testimony. I thought the wind was going to come in, and it didn't.

Mr. Segan: Because there was no wind.

Mr. Fetell: It's my oversight. It's my intention to show there was prior wind that day and it was an oversight.

(5.28) On Page 14 in the handwritten portion, the second line, first word only.

May I respectfully inquire of the Court why the word "only" appears?

The Court: Because of the testimony of Mr. Cirto. He said—this wasn't a scaffold job at all. All I had to do is give them ladders because they were bound to work off ladders.

Mr. Fetell: I am beginning to see a pattern in your Honor's decision which is consistent with a rule of law, and that's why I checked the section.

The section requires one to furnish adequate equipment.

Now, that would have to include everything without breaking it down. And when your Honor added the word "ladder" earlier, I said I had no quarrel with that and I wanted to see where it fit in.

If the approach is a consistent one now, and the Court is saying, look, the law requires certain individuals, the defendant is a GC owner, to do certain things under the statute, whatever the statute requires him to do, and (5.29) string it all out, I have no quarrel with that because the jury will make the determination.

Colloquy re Requests to Charge

But if we go off the general, into specifics now, as to ladders and scaffolds, then I see the consistent pattern, and going off into a tangent, and I have no quarrel with the original proposition.

I except to the rule that there are obligations. But if we stay with the statutory language all the way through—

The Court: We have.

Mr. Fetell: Once we get into only—

The Court: Because of Cirto's testimony. He has raised a last minute defense completely unanticipated to everybody, to wit, that this is not a scaffold case, this is a ladder case, and I gave the man the ladders.

If the jury believes that, and believes that the ladder is adequate, then the defense has prevailed. That's why it's in there.

Mr. Fetell: The word "required" means that it's required by statute.

The Court: 240.

Mr. Fetell: 240 never requires ladders. (5.30) It requires all other items also.

The Court: In this case, because the only evidence germane to ladders in the testimony of Mr. Cirto that ladders were to be all, end all and sufficient.

Mr. Fetell: I begin to get a slow picture of it, and I will simply take an exception to the following language at Page 14, starting with the last paragraph, where it says, if you conclude, and ending—

The Court: Fascia to the beam.

Mr. Fetell: I will go into the next page, your Honor, and I might as well be consistent all the way through.

The Court: Oh, yes.

Mr. Fetell: The entire balance of Page 14 and the language on Page 14(a) starting, if you conclude, and ending with the words to furnish proper devices.

The Court: All right, I have it.

And you join in that exception?

Mr. Bakalor: Yes, your Honor. But continuing on in the exceptions I was making insofar as my opinion, there would be no proximate (5.31) cause. And in addition to the four times bearing weight, which we just spoke about, it also seems to me on the same logic, and again just to protect the record, understanding your Honor's ruling we would have the same thing on the charge on Page 14 where it says, two inch planking or three-quarter inch plywood, because again since it didn't break, I can't see how it has anything to do with the particular accident. And understanding your Honor's position that it might be Mr. Cirto not complying with overhead protection, and I understand that and I would like my exception noted.

And on Page 14 I except to the word "ladders" in the bottom portion of this charge, because straight through I excepted to ladders in the case.

Mr. Segan: 14(a) is what we are up to, your Honor?

The Court: Yes.

Mr. Segan: In the typewritten portion of 14(a), where you start, your Honor, with that fact, however, does not relieve Worthman of its statutory responsibility, I withheld the language (5.32) of nondelegability.

The Court: I agree with Judge Breitel that that Judge confuses the whole incident.

He says you can delegate.

Mr. Fetell: He got confused with the word nondelegability

The Court: No. He talks about persistent responsibility, if you will, and got rid of the word nondelegability.

Mr. Segan: The only other exception I have to the typewritten language, while it's not my way in the third party action, I will raise a question, your Honor, as to whether the Court should submit to the jury any issues relating to the third party action.

Now, we haven't arrived at that point and I will reserve it.

Colloquy re Requests to Charge

Mr. Bakalor: On 14(a), your Honor, I will again except to the use of "ladders".

In addition, I will except to that portion of the charge where you referred to the language of the specifications requiring Collyer to furnish any scaffolding or other equipment, and not referring to that since it's your Honor's (5.33) expression, and certainly it's in the evidence.

But I will except to that without also referring to that portion of the charge—that portion of the contract, where it refers to the fact that the subcontractor in the discretion of the contractor can borrow their equipment. Because I think one reference without the other is frankly unfair to the third party defendant. I think it's Section 11.11 of the contract.

The Court: I have the thing there.

Yes, it is.

Has anybody got the contract ready?

Mr. Fetell: Yes, it's right here.

The Court: I said needed for its work, and made available to Collyer, Worthman's equipment at Worthman's discretion and at mutually satisfactory terms.

That fact and those provisions, however, et cetera—

Mr. Fetell: What page are we on?

The Court: That's 14(a), the typed part.

Mr. Segan: Your Honor, may we begin with, you will observe?

The Court: You will observe the language (5.34) of the specifications of the contract required Collyer to furnish any scaffolding and other equipment needed for its work and made available to Collyer, Worthman's equipment, at Worthman's discretion and on mutually satisfactory terms.

That's the language of the contract with minimum paraphrasing.

Mr. Bakalor: Thank you, your Honor.

The Court: That fact and those provisions, however, do not relieve Worthman of its statutory responsibility.

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Mr. Fetell: May I respectfully request instead of the word, Worthman, does not relieve either party of the—

Mr. Segan: No, no.

Mr. Fetell: I will show it to you in a moment and I will except on another page, and that's why I took a look at 240 just now, and I will argue there is statutory liability.

Let me look at 240, and I will cover two sections of the charge at the same time, your Honor. It may be a little clearer if I jump ahead to Page 17 of your Honor's charge.

The Court: My tattered charge.

(5.35) Mr. Fetell: Sir?

The Court: My tattered charge.

Mr. Fetell: Rather this way than to be kept in the dark.

Your Honor has made reference to the claim over, indicating that the negligence or the tort referred to in your indemnification is the tort of plaintiff and Falasca.

The Court: And/or plaintiff.

Mr. Fetell: Yes, and/or plaintiff.

McKechnie and Falasca, your Honor.

And may I point out, your Honor, the very section of—the very language of section 240—that's why I am doing it now in the context of a request to charge, your Honor.

All contractors shall furnish.

The Court: Unfortunately, I think a hyper-critical catalyst would be neither the union nor the gentleman who introduced the bill understood the preexisted law or the law it created.

Mr. Fetell: I know who wrote it and I discussed it with him.

The Union didn't write it and I used it in the brief.

(5.36) The Court: It would be easy to argue contractor means contractor, and anybody who signs a contract is a contractor.

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And it's also easy to argue where one makes a contract with an owner, he is a contractor within the meaning of Section 240.

Mr. Fetell: It says all contractors.

The Court: Yes.

But that, as you know, is the way in which I first read the statute.

Now, I am persuaded that Mr. Bakalor is right that the statute marked a change from the preexisting system, under which, specifically under 240, the subcontractor was the man liable under the statute, and he is the one who had this duty because he is the one who was both employer and director of the work.

Now, when the statute was changed, the transition was to a system in which, rather than to name it down to the man whose activity particularly caused the harm which had been the scheme of 240, the old 240; they went to a system which had simplicity of application and nailed it on the owner and the general contractor.

(5.37) Thus, not simply making the general contractor a surity for the person formerly liable under 240, the sole contractor, but rather making him solely and exclusively liable so that the obligation could be made to rest with undeviating, unquestionable certainty at one place, relying presumably on Section 200 and 241, Subdivision 6, to rely —to catch up with any faults of the subcontractor itself.

And I rely on—

Mr. Fetell: Permit me to suggest, your Honor, it's a total misleading, your Honor, and let me tell you why.

I wrote the briefs on Rocha and argued it. And I met with an adversary who was arguing to the contrary. And let me take a moment on this, your Honor, go back to the old 240, one who furinshes or directs another. That could be anybody, any man coming off the street.

The Court: Yes, it can be anyone else who successfully interferes.

Mr. Fetell: Right.

And at that posture of the law an owner (5.38) and a general contractor was insulated from liability unless he directed or furnished.

Now, my argument—which was accepted in the Appellate Courts in Roacha was this: The amendment to 240 was not as your Honor suggests a realignment to the two parties was simply adding another one to an already existed list.

The Court: That's what I would argue. I would say when in the world is a statute that is supposed to increase the rights of laboring men result in the losing of some of their rights.

But the legislative, and the cases are—

Mr. Fetell: What I was saying yesterday, your Honor when I said it was ingenious, this is exactly what I had in mind.

The legislative intent argument was to show as follows—and this is the very argument made in the Appellate Court: What was happening as a practical matter was, nobody would contract to put a scaffold up and they made sure only the employer put his own, and they knew compensation was a bar, and everybody went away very happy that nobody can lay a glove on them (5.39) for a bad scaffold.

Now, the purpose of the change was, they were saying to owners and general contractors, this is a dangerous work and you can't hire cheap contractors who are going to cut prices. And the way they were going to save is by not putting up good scaffolds, which are expensive.

And they said, you hire these men who are responsible. If they put up cheap or improper scaffolds, we will then hold you responsible.

So that was extending the umbrella—the argument made by Mr. McNulty in Rocha.

The Court: That's the same McNulty who goes back many years—

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Mr. Fetell: That's the father and an appellant attorney and a good one.

The argument he made was an owner and—well, I had argued that a change by definition is a change, and a change in statute that does not accomplish something new or different is not a change.

Nobody quarrelled with the proposition (5.40) not even he, that something new was being added.

And Mr. Bakalor, who is a good lawyer, has come up with something ingenious. He is a substituting party and not an adding party because that brings us right back where we started from.

The Court: We are not right back where we started from.

Mr. Fetell: I am talking in a construction industry where we have circular problems and not legal ones.

And I must insist, your Honor, to get to Page 17 we must be specific now.

The tort referred to in the indemnification, the tort was not the only men in the job. The tort was Collyer when they sent those two men in to do a job who admittedly said, we don't have the men to get in there.

And the tort started before Mr. McKechnie and Mr. Falasca got to the job. There was a contractor furnishing the equipment. And he obviously didn't furnish the equipment. And that's why I am stressing the canopy is not an afterthought. It was designed in.

(5.41) And the tort was failure to furnish, and the words failure to furnish I am taking right out of Section 240. And then I say with respect to 17, to add that element in and—

The Court: That would be now going back to the first draft of the charge in which I said the obligation to furnish adequate scaffolding or ladders rested on both the general contractor, owner and on Collyer.

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Mr. Fetell: That I agree.

The Court: If I had to interpret it, I would so interpret it.

But what is that famous phrase? I do not write on a blank page.

The legislative material and the judicial antecedents and consequences of it seem to me to require accepting the basic part of Mr. Bakalor's argument.

Mr. Fetell: In that event I take a formal exception.

The Court: All right.

Let's move along now.

That we are clear on from the very beginning of the case, and there is no question (5.42) you have excepted to that throughout.

Mr. Fetell: It's synthesized now.

All right, I except to Page 14(a)—let me, where you have that in there—

The Court: I think you excepted to the underlying theory that controls the entire charge on the claimover. Because it requires a showing of negligence, common law negligence or Section 200, negligence on the part of Collyer toward McKechnie.

You say, no, if the contractor had a duty to supply scaffolding or a ladder, so and exactly to the same extent did Collyer.

Mr. Fetell: Now, my statutory authority, my case authority and just to get it on the record, is *Bignami v. Caristo Construction Corp.*, 42 App. Div. 600, 345 N. Y. 2d 103, Second Department, 1973, where there was a statutory and contractual obligation.

The Court: You had given that to me before, and I have already taken a look at it.

Mr. Fetell: I want to do it in this context now so my record is protected if I don't find specific spots by the way your Honor has (5.43) formulated it.

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The Court: That's right. Nothing can be clearer in this case, in which little is clear.

Mr. Fetell: Yes, your Honor.

Mr. Segan: Are we on 15 now?

The Court: Yes, sir.

Mr. Bakalor: On Page 15 I except to that portion of the charge where you take out the plaintiff's case against the defendant, contributory negligence, not on the basis of excepting to the fact that normally contributory negligence is not a defense to Section 240, and I understand that. But I am saying once the standards are charged and which are not applicable to 240, and since we don't know on what basis the jury is making the determination, whether it's solely 240 or 240 implemented by the rules, my understanding of the New York Law is that the defense of contributory negligence is a defense to a violation of Rule 23. And thus based on the way the charge is going in with Rule 23 included, I thus except to also not including a charge on contrib to the (5.44) plaintiff's case against the defendant.

The Court: May I point out that the action is never on the regulations and the regulations are referred to as furnishing only a standard.

Mr. Bakalor: I understand your Honor's feelings.

Mr. Fetell: I don't join in that exception. I do not want to introduce contributory negligence to a 240 case, your Honor, at this point in my career.

Mr. Segan: It depends on who he is representing, your Honor.

Mr. Bakalor: I think there is a word left out. We talk about Worthman having the burden of proving it's essential elements over its claim against Collyer by a preponderance of the evidence. And if the evidence fails in your judgment to establish any essential element.

I think it should read a third party plaintiff's case there, shouldn't it?

Colloquy re Requests to Charge

The Court: Oh, yes.

Shouldn't I say Worthman's?

Mr. Bakalor: That would be clearer for (5.45) the jury, yes, your Honor.

The Court: All right.

Mr. Segan: Your Honor, I would like to press and go back to the typewritten paragraph, and I apologize, it has to do with the lines you referred to plaintiff's own negligence.

The Court: Yes.

Mr. Segan: I am very very troubled by the language.

The Court: I can't improve on that. I looked at it again last night and I looked at the language in your memo. And I think I have done it better.

Mr. Segan: Let me say this, your Honor: When talking about the plaintiff's case, you are saying in this kind of case plaintiff's own negligence if he was negligent.

By putting that parenthetical clause in there I am very very disturbed that the jury will now import the negligence that—

The Court: I am delighted to take it out. I put it in because I didn't want to get or have anyone thinking I was presupposing.

Mr. Fetell: I have no quarrel of taking (5.46) it out.

The Court: I wouldn't think you would.

Mr. Segan: I understand what you're saying, then leave it, your Honor. I am saying leave it only because of the fact that I am troubled by the whole language of the sentence. And you already indicated it's staying.

The Court: You can have it out, if you want it. They will be delighted to have it out.

Mr. Fetell: You're an Indian giver.

Mr. Segan: I will have it left in then.

All rght, now getting—I'm sorry, is there—

Colloquy re Requests to Charge

The Court: The rest of the charge really has to do with Collyer.

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(5.50) Mr. Bakalor: I am on 16.

May I respectfully request—except to that portion of the charge which determines as a matter of law that the contractor inures to Worthman's benefit, and I don't think it's a question of fact and I stated it yesterday to the Court.

And to protect the record, I would say since the contract, not signed by Worthman, should not inure to the benefit.

The Court: I understand your position, I think, anyway.

Mr. Bakalor: Thank you, your Honor.

I have no other exceptions to 16.

Mr. Segan: Do you have any exceptions on 16?

Mr. Fetell: No.

(5.51) Mr. Segan: I am on 17, and we go down to the last sentence of 17, if you conclude that plaintiff was negligent in proceeding as he did, then that negligence was Collyer's, unless you are satisfied under all the circumstances that the risk was so evident that you concluded that plaintiff proceeded as he did could not fairly be regarded as an act of his employment in the service of Collyer.

Now, your Honor, I would most respectfully ask for a reiteration at this point that this is strictly in the case of Collyer. And once again, I repeat any act by the plaintiff has no bearing on the plaintiff's own case. This is strictly on the case of—because as we rode along, so much language goes by and this jury may completely forget what you said earlier, and somebody on the jury may say, wait a minute, we have to consider the plaintiff's negligence.

Mr. Fetell: I will also have an exception in that area.

The Court: Well, in considering this last aspect of the claim, bear in mind that plaintiff's negligence, if any, is wholly (5.52) irrelevant to plaintiff's claim against Worthman and should not be discussed in considering that claim.

Mr. Segan: Thank you, your Honor.

Mr. Fetell: Now, with respect to Page 17, your Honor—

The Court: Yes, sir.

Mr. Fetell: About 11 lines from the bottom, if you conclude—

The Court: I see.

If you conclude the plaintiff was negligent?

Mr. Fetell: If you conclude the plaintiff was negligent in proceeding as he did, then that negligence was Collyer's. No quarrel with that.

And after that, before I make any argument, I am frankly puzzled by what the Court had in mind.

The Court: Me, too.

This arises out of counsel's argument that—about the patent and latent defects, remember the arguments you said was ingenious, but now what I am bothered about is all this (5.53) vestigial talk in the New York cases about the obvious, and the most recent discussions of Section 343(a) and all that stuff about if it's obvious, but despite its obviousness, the owner, or whoever, the defendant, had reason to anticipate that obvious or not it can be a source of injury.

So I think that is a limitation, that whole thing that is boiling up in New York cases, and which is greatly emphasized in federal cases considering New York cases.

But that all means that the language on which Mr. Bakalor relies for his patent obvious distinction is for the most part older language and may not stand reanalysis the next time it comes up.

Colloquy re Requests to Charge

What I was trying to figure out is whether there is an idea there that isn't assumption of risk, isn't contributory negligence, but amounts to an idea like that—

Mr. Segan: Authorization, I think.

The Court: —a doctor can't complain if he catches measles from one of his patients. That's his business. (5.54) If he sends his nurse in to see someone who has come in with a suspected case of measles, and she gets measles, he may be at fault because he is supposed to be able to spot measles in 70 patients and she isn't.

Are these men doing the kind of thing that they are hired to do.

Mr. Segan: Authorized, that's what I think it is.

The Court: Are these men to go up on the canopy? And is that so integral to their work that they could not more establish a liability for falling off a canopy, and they could for having hit their thumbs with a hammer?

Mr. Fetell: I will reject that as the spirit of the Labor Law.

The Court: You see what we are after, there is not a definition of defense to tort, but whether you can define a tort in an area that is so totally intimate to the skill of a trade, that injury arising out of it, though it's a known risk of the trade, can never be regarded as clear negligence toward the employee.

For example, if the owner of a high wire (5.55) team sends the team up on a high wire with an adequate net under him and one breaks an arm, well, that's what being a high wire man is.

Now, that's the idea that may survive, that there is no tort and—

Mr. Segan: You know, your Honor, that's been answered in all due respect to everybody, and I don't want to get into it, but for the Court's consideration that has been answered.

Colloquy re Requests to Charge

On the contributory negligence aspect, the assumption of risk you have a Kaplan case that says you can't charge this man who saw a patent defect, and this was a plank, and it says by saying he walked across it, your Honor.

They said the economic pressures on the man is a consideration to be had. And that's certainly a consideration upon the lawyer, and that's how they created the Labor Law the way it is.

If this man said, "I am not going to walk across the plank," they will throw him off the job.

Mr. Fetell: Yes, but if your Honor's analysis is correct, it's correct in both cases (5.56) from a theoretical point of view. And you can't have the word in one, and charge it out of another. And the word "unless" is an exception.

And the Labor Laws have now set standards, and it is strict.

And as your Honor said, it's not so, your Honor; it's not so in Labor Law as in Jones, and it's been so in maritime.

And, your Honor, I was puzzled by the import, your Honor, but now that I see it—

The Court: Suppose I deleted it, Mr. Bakalor?

Mr. Fetell: Fine.

Mr. Bakalor: I will be excepting to the denial of my request later on, at least a portion of it, because I think it went too far, which I have in my papers as Request Number 8.

The Court: Let me get a hold of it.

Mr. Bakalor: Yes, which is bsically the art of my—the reason for my argument yesterday for a directed verdict, because they can't be considered negligent if the default or danger was readily observable by plaintiff considering the plaintiff's age, et cetera, (5.57) et cetera; stopping on that portion when I referred to Jones v.

Colloquy re Requests to Charge

Radio City Music Hall is really applicable to this case.

So, frankly, if you take out this latter language, I am going to be excepting to the fact that there is no language of this nature in it, because I don't think it's some type of thing, if it's so obvious to the employee, the employer should not be negligent.

And I have trouble putting it in the exact words based on the present status of the New York Law.

The Court: That represents about an hour and a half of work last night.

Mr. Fetell: Your Honor, it's so open and obviously an employee that the employer's obligation disappears is totally unsupported.

The Court: That is the outer limit here.

Mr. Fetell: Absolutely. And certainly in the Labor Law, if it's going to creep into the Law, it's not going to creep into the construction or ship cases, because we are back to the chaotic days.

(5.58) And the 1969 amendments to 240 went in the opposite direction and took contributory negligence out.

If you're taking contributory negligence out in a scaffold case, Mr. Bakalor is marching in the opposite direction.

Mr. Bakalor: It's not the question of not being put into the law. The question is how far out is it taken.

The Court: I think I will live with that and your exception.

Mr. Fetell: It's going out?

The Court: No.

Mr. Segan: It's staying in, Lester.

The Court: It's staying in.

Mr. Bakalor: If I may, on Page 18—

Mr. Fetell: Your Honor, for the record, I respectfully except to that portion of your Honor's charge on Page 17.

Colloquy re Requests to Charge

The Court: Following the word, Collyers, and commencing, unless you are satisfied on all these circumstances and concluding with—in the course of his employment and in the service of Collyer?

(5.59) Mr. Fetell: Yes.

Mr. Bakalor: Are you taking requests at a later time, or are we doing it together?

The Court: You better do it together.

Mr. Bakalor: I do not except to that portion of the charge that Mr. Fetell just excepted to. But let me say, your Honor, are we having the requests to charge marked as a Court exhibit?

The Court: No. They will be docketed and filed.

Mr. Bakalor: May I refer to the number without reading it?

The Court: Yes.

Mr. Bakalor: Then I take exception, your Honor, to your Honor's refusal to charge, at least in the substance, my request in request number 8, up to the last portion, your Honor, where it said, standing on an object—well, prior to that point where I have the citation, I take exception to your Honor not charging number 8.

The Court: Yes.

Mr. Bakalor: And also, on the top here (5.60) where you say against Collyer, your Honor, I do not object to that language, but I would also add that for all of the damages awarded to the plaintiff, and I think the jury should know exactly what they are deciding.

Mr. Segan: You're going to ask for sympathy on that one.

Mr. Fetell: What Page is that? I have it here.

No objection to that one being added, and I guess it also includes expenses and counsel fees. I think you touched on that.

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Colloquy re Requests to Charge

(5.73) Mr. Bakalor: Your Honor, I respectfully except to any charge on Dole v. Dow.

The Court: That's a question in the charge. We haven't talked about it at all and it's there, I suppose, and it's in the pleadings.

Mr. Bakalor: The reason I say it's probably not there —and this gives the jury another (5.74) thing to think about which they probably don't have to think about— is that my understanding of the contract—and maybe I am wrong, your Honor—but if we are found a half a percent negligent, whatever the percentage is, we must give one hundred percent indemnity. So there is no sense in having a Dole v. Dow apportionment.

The Court: How about that?

Mr. Bakalor: And also, your Honor, the cases are readily clear as to my understanding of them, that once there is a contractual agreement of indemnity between the parties, as your Honor has decided there is in this case, the contractual indemnity takes precedence over any Dole v. Dow apportionment.

The Court: I am not clear about that.

Is that the case?

Mr. Fetell: That's what attorneys are arguing now, your Honor. And I have had attorneys saying, look at case so and so, and I look at it. And unless somebody says, your Honor, the line of cases under Mortonson are *sui generis* to maritime cases, there is no question, one percent is enough.

(5.75) The rationale is there, and the logic is there, and we are living with it, and I take the position that Mortonson is—

The Court: You don't request Dole v. Dow?

Mr. Bakalor: No, your Honor.

Mr. Fetell: No, your Honor.

The Court: Then it's out.

Colloquy re Requests to Charge

Mr. Segan: May I know what page we are back to now?

The Court: Well, 80 is out, and we are now on 100.

Mr. Segan: 100 is in; 80 is out.

The Court: Then the next is 202.

Mr. Segan: Then 5 is out also. So after 202, the fifth question would be out; is that so?

The Court: What is that?

Mr. Fetell: Yes.

Mr. Segan: Okay.

The Court: You add at 202 the stipulations.

Mr. Bakalor: Your Honor, if I may, basically until I get down to the special verdict, I have no other exceptions to the charge. But as far as the request to charge, since your (5.76) Honor said we would also take them up at this time—

Mr. Segan: Aren't we going to take that up after with the exceptions?

The Court: I might charge it.

Mr. Segan: I thought that's all been taken into consideration.

The Court: He has other requests.

Mr. Bakalor: No others, just exceptions, your Honor, to charge certain requests.

The Court: All right.

Mr. Bakalor: On request number two, which talks about charging that Collyer is not statutorily liable under Section 240 of the Labor Law, your Honor, I take exception to not charging that for the reason that once you read the language to the jury in Section 240 of the Labor Law, which says all contractors, and as we see from Mr. Fetell's cogent argument, your Honor, that many attorneys could take it for granted that it's also referring to Collyers. And unless the jury is told that Collyer doesn't fall under this section of the Labor Law, and the

jury can say the statute says all contractors, (5.77) and Collyer is a contractor, and, therefore, it's quite obvious that they are referred to as a contractor under this statute as given to them in the charge as worded.

The Court: I am putting in at the foot of Page 12, after the quotation of the statute, the word contractors as used in the statute means general contractors and does not include a subcontractor such as Collyers.

Mr. Bakalor: Thank you, your Honor.

Mr. Fetell: To which I—

The Court: To which you emphatically except.

Mr. Fetell: Affirmatively and emphatically.

The Clerk: The jury wants to know if they can go get a cup of coffee.

Mr. Segan: We may have some discussion.

The Court: Okay.

Mr. Bakalor: On request number four, which your Honor will charge, and I have no exception, of course, to your Honor charging it, but—

Mr. Fetell: Where is he putting that in?

The Law Clerk: Right here.

(5.78) The Court: What did I do with it? I had it here a minute ago. Here it is. I had it in the middle of my charge.

Mr. Bakalor: Yes, sir, and which you have charged, your Honor. The only thing I want to make clear, your Honor, when I requested number four, that Collyer only —and this is not word for word—but Collyer only has to indemnify Worthman if they are found negligent. I did not mean to waive my argument that the contract was not applicable at all to Collyer and Worthman. I only made that request on the understanding that your Honor is charging that the contract is between Collyer and Worthman.

The Court: I understand.

Colloquy re Requests to Charge

Mr. Fetell: When your Honor puts in the word "contract", your Honor, are you going to use the word Collyer or subcontractor?

The Court: Subcontractor such as Collyer.

Mr. Bakalor: The last request I would like to talk about is my request number 10. And I would take exception to your Honor not charging in substance my request number 10.

The Court: I can't accept the logic of it (5.79) and decline to so charge.

Mr. Bakalor: Respectfully except, your Honor.

And the last thing I have is on the special verdicts and written questions.

The Court: I did not ask you, gentlemen, that, but how—

Mr. Fetell: Your Honor, very specific and very clear.

Mr. Bakalor: Based on the fact that Dole v. Dow is not going to be charged—

The Court: So six is out.

Mr. Segan: Five is out.

Mr. Bakalor: On four, I would request the language, rather than was Collyer at fault in providing—was he—to the language of negligence to be used.

The Court: Change that to neglect.

The Law Clerk: I gave it to them.

Mr. Fetell: This is the one? At fault?

Mr. Bakalor: Even taking the new language, your Honor—I am sorry, I was using the wrong sheet.

I don't know if the jury would take the (5.80) concept was Collyer at fault in neglecting, to meaning the simple thing, was Collyer negligent, which is the simplest language.

And I think the language to the jury is: Was Collyer negligent in failure to provide.

The Court: Good, okay.

Colloquy re Requests to Charge

Mr. Segan: The only one you really changed, your Honor, was the last question, am I correct, from one of the individuals?

The Court: Yes, that's correct.

Mr. Fetell: On number four, your Honor, I was studying that for a moment, your Honor. When you say Collyer, now we are back to that again. Your Honor is refusing to charge Collyer's negligence as employer, but you're doing it only through its employees.

And now we are getting back into Collyer. And when you use the word "Collyer" at number four, in what form are you using it now? It's correct as it stands now, but it's inconsistent.

The Court: I don't think so because I think in the language of the charge I have indicated that the negligence of the plaintiff was (5.81) the negligence of Collyer.

Mr. Fetell: You said to the jury that Collyer had no duty to provide—

The Court: A statutory duty.

Mr. Fetell: That's right.

And then you're back here saying, was he negligent?

That's too subtle, your Honor. They are going to say we heard what his Honor said, they don't have any duty and how can he be negligent? And that creates a problem.

The Court: I will say much more than that.

Mr. Fetell: Yes, I understand, your Honor. We are attorneys and the problem is to deal with these special interrogatories which does not create a confusion. And if this is not a jury problem, your Honor, I understand what your Honor is saying and we had the benefit of the argument and subtle discussions.

The jury hears this in a gross way that the charge said there is no statutory duty and now they find negligence.

Colloquy re Requests to Charge

And we have a very very serious problem (5.82) here with semantics.

And I request that—

The Court: I will live with it, I think, and you have an exception.

Mr. Fetell: I have an exception.

Mr. Segan: Your Honor, with respect to the record, may I just formally state for the record that whichever portions of my request to charge, and I believe that sections which were not charged in particular, and I think most of my language was not adopted by the Court, except the request to charge 240—

The Court: I think I have taken every single idea you have.

Mr. Segan: I am not complaining and I only want to state for the formality of the record I except and I will not argue it. No paragraphs, I will confine it to one sentence for me.

Mr. Fetell: And to the extent the Court has refused to charge my request number 1 and 2, I would respectfully except.

The Court: Don't forget to renew them after the charge is given.

Motion to Dismiss Third-Party Complaint.

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(4-174) Mr. Bakalor: Your Honor, at this point I would like to move both to have the third party plaintiff's complaint dismissed for failure to make out a prima facie case, and also for a directed verdict on various grounds. (4-175) The first ground solely deals with the contractual claim and that the evidence is clear that the contract was solely with Beach Haven Builders.

Mr. Russo said there was an entity in addition to Beach Haven Associates, Inc., called Beach Haven Associates, Inc. It is our contention that when you enter in a contract to indemnify one party, even though another party comes along and takes over the job, there is no legal obligation, contractual obligation, to indemnify the parties.

On that first ground, I move to dismiss solely the contractual claim over it.

On the second portion of the motion, again it dealt with, again solely the contractual claim over it. I move to dismiss that contractual claim on the grounds that on our view of the New York law, even following Shell versus Levine Oil, and the Kurak case, that this contract does not evince an unmistakable intent to indemnify the third party defendant, such as the circumstances, such as where the alleged defect that caused the accident was caused solely by the affirmative creation of an improper scaffold, if you buy the plaintiff's case. Obviously, if the plaintiff doesn't prove a scaffold—

(4-176) The Court: Up to this point, that's the only case.

Mr. Bakalor: Third party plaintiff, through its own men, admittedly so created the condition and then gave permission or acquiescence, if not direction, to the employees of the third party defendant to go upon this creation to do its work, where in the contract it does give

the third party defendant the right to use the equipment of the contractor, when the contractor so agrees.

I understand there are portions of the contract saying that we are to provide for scaffold, but obviously not necessarily so when a third party plaintiff allows us to use equipment.

Without belaboring the point, this contract does evince an unmistakable intent to indemnify under the circumstances of this case and to that direction, I cite the Judlak case, which I have submitted to the Court in my first brief, which frankly, when I first saw the case, thought they would allow indemnity whether they didn't allow indemnity in that case. That of course is only a—it's to be argued on May 4th with the Court of Appeals. We don't know what the Court will do with it.

The Lopez case in the brief I gave to the (4-177) Court this morning, on the case of Lopez versus Con Edison, we have a similar case at the bar where the person injured was a third party defendant's employee. The defendant conceded he had violated Section 200 of the Labor Law.

Where the indemnity contract talks about third party defendant having to indemnify if the accident is caused by any act or omission—not even a negligent act or omission.

I must say again in candor with the Court, in that context, it says whole and in part and our contract has additional detail.

In any event, in that case, Con Ed was held liable and the third party defendant's action was dismissed by the trial judge and that dismissal was affirmed in the Appellate Term, the Appellate Division and the Court of Appeals four-three in the Court of Appeals, but it was so affirmed, and I think—and in the Court of Appeals affirmance, the majority decision which was very interesting

said, in making its decision, their decision was basically the third party defendant wasn't negligent and therefore the indemnity agreement doesn't require indemnification.

What they did say, they specificaly said they were not deciding whether or not this contract even evinced an unmistakable intent to indemnify under the (4-178) circumstances, and I submit under the particular facts of this particular case, this contract has not so evinced unmistakable intent.

Leaving the contractual points for the moment, and going into the reason for a complete dismissal of the entire case, this includes the Dole v. Dowd claim, which would only become important if the contractual claim were to drop by itself.

The contractual claim remains by itself. It takes precedence.

Also the claim that there has been proof of negligence, under the particular facts of this case, there can be no finding of a breach of the employer's duty and thus no violation, no commission of negligence.

If we start with the proposition that to indemnify under that contract, you must find negligence, to find negligence, there must be a breach of duty, and the breach of duty is not the breach of the third party plaintiff but to the plaintiff. That is where the breach of the duty would have to lie.

To find a breach of--

The Court: You are clear on that. That is not talking about breach of duty owed to the general contractor but owed to the plaintiff?

Mr. Bakalor: Yes. Thus we have to see what (4-179) duty the employer owes to the employee.

Now, I believe that that duty is solely a commonlaw duty as codified by Section 200 of the Labor Law and the case, including the Court of Appeals cases which I

have cited in my last brief in the claim against Studebaker, another case in the Court of Appeals. They are clear, the only duty they are not talking about is contributory negligence.

The employer only owes a duty to the employee from hidden dangers, those dangers the employee himself did not, could not recognize, which the employer should recognize.

If that be the case, the only person really whose negligence would be attributable to us in this case, if any, the negligence would be that of the employee, Mr. McKechnie. The argument runs like a circle, but if Mr. McKechnie was negligent, so we could be negligent. That would mean that he knew or should have known the scaffold was unsafe.

If he knew or should have known it was unsafe, we knew.

What happens at that point, once Mr. McKechnie knew or should have known that it was unsafe, we no longer have to protect him from hidden danger because it's not hidden, and thus, under the facts of this particular case, where the negligence was attempted to (4-180) be attributable to us, to that of the injured party, there cannot be any breach of duty.

The Court: In other words, you are saying the only basis on which we could be found to be negligent would be on a ground on which the negligence would be patent?

Mr. Bakalor: Yes, sir.

The Court: That's not within the range of the duties owed by an employer to an employee?

Mr. Bakalor: Yes, sir. That's basically—precisely the argument. Where I distinguish it from the situation where if Mr. Velasca, let us say, was the injured party or a laborer was the injured party or perhaps the jury could say the foreman, Mr. McKechnie, because of his

intelligence, age, experience, he should have known but really perhaps this was a hidden danger to the laborer.

The Court: Velasca?

Mr. Bakalor: For the sake of argument, maybe you can say—perhaps it's stretching that, maybe an employer under those circumstances knew or should have known of the danger which was hidden to Mr. Velasca, but under the circumstances of this case, the knowledge of the employee, Mr. McKechnie, is being attributed to the employer. Whatever one knew, the (4-181) other knew.

If it's hidden to one, it's hidden to the other. If it's patent to one, it's patent to another. Therefore, there would be no breach of a duty.

Based on that, the third party plaintiff has failed to make a case against the third party defendant.

Mr. Fetell: Ingenious but inconsistent.

The Court: He's a good lawyer.

Mr. F[illegible]: Absolutely. No question about it.

First of all, let me get to the patent aspect. This is not the case of a collapsing situation.

The violation which Worthman allegedly is guilty of was failure to provide a scaffold that meets code. Now, code requires railings, et cetera, et cetera, et cetera. To the extent that it is an improper scaffold, it is patent as all get out. If it's a scaffold, *arguendo,* and if it's the fact.

So, the patent argument really simply doesn't hold water here. We don't have to get to that.

The form of indemnifications that are running loose in the construction industry in the United States would make one's hair stand on end. Every time a lawyer represents a general contractor, they have been writing all kinds of weird indemnifications.

(4-182) It got so bad the Court of Appeals found itself upholding—the Appellate Division in Kelly against Kar-

isko, the following: You will indemnify me, Mr. Subcontractor, if I am side by side with anybody on the job, regardless of who causes the accident, and that while indemnification was upheld until the legislature couldn't stand any more.

That was the one that your Honor alluded to earlier, I think maybe even off the record.

There is one form on indemnifying which violates public policy. You indemnify me even though you are not on the job. It has nothing to do with your work.

All other indemnifications have been sustained in the State Court.

Now, with that in mind, the one bad part is not one of those that an attorney whipped together. This is a standard I.I.A. indemnification, which is probably used more than any other.

It says, for loss arriving out of or resulting from the performance. It has nothing to do with the culpability for the moment, even though we can show culpability.

I just want to get to the very language itself.

It certainly arose out of the work, there has been no accident, had it not been the very work (4-183) Collyer was doing and Collyer's employee. It's, if you will, establishing an argument with semantics arising out of it and certainly resulting from the performance of it.

On that ground alone, absent a showing that it violates that public policy, even though I think this one may and the date of the change we don't have to get into. Let's get to other parts.

I don't understand Mr. Bakalor's argument that Mr. McKechnie's actions depend on whether Mr. McKechnie was the target of the accident or Mr. Velasca was. Both of those gentlemen—

The Court: His argument there was that the accident, that the risk could have been patent and disclosed to

Mr. McKechnie, who was the foreman on the job, as between the two men, and yet be a patent on the disclosed defect as to Velasca, so that if Mr. McKechnie hadn't gone up on top and knew that it was a dangerous scaffold and nevertheless let Velasca come up, Velasca might have a complaint.

Mr. Fetell: If that was a scaffold, it violated the regulations. It had no railing. It was more than 5 feet off the ground.

If that were a scaffold, it absolutely, on its face, violated the law.

I am not conceding it was a scaffold. If it (4-184) was a scaffold, I will not argue it wasn't a violation. It had no railings on it.

On its face, it simply violated it in that respect, but that isn't where we are going now.

It was Mr. McKechnie who fell and that's under Spondi—

The Court: I think what Mr. Bakalor's argument then becomes is, you say that this was obviously a defective scaffold. There is no claim because Collyer owed no duty to, no safe place to work, a duty under 200 and 241 and subsection, to its own employees at commonlaw or elsewhere and Section 200 also rings in the code, because its duty is only to protect its men against what is not out there, because they are all in the business together. That would be the rationalization.

Mr. Fetell: I have no trouble with that argument.

The Court: So, it's only where the employer knows, the employee doesn't know that it creates a risk, that there is a breach of duty from a employer to employee. He hands him the tools and says here, this is a U. L. tested tool. You can use it with safety. The man starts to use it and he gets shot and killed.

They should never have given him such a tool with (4-185) a fake U. L. label on it.

Here he says no, because here what was wrong was that, at least obvious to McKechnie, and even to Velasca, as you see, to the president of Collyer. All of them. There was no breach of duty to anybody because everybody was busy slitting its own throat.

Mr. Fetell: The argument that Collyer owed no Section 200 duty to—

The Court: Mortonson was the law of the land.

Mr. Fetell: More so than that. It's even worse than that. He is saying that since the employer owed no duty, he could owe no duty to Worthman. It did owe a duty to Worthman and not by an operation of law.

The Court: Here, this part you are talking about something quite else. Where he gets back into the covenant is by saying, the covenant has two parts. There is nothing wrong with that.

It does apply to this transaction but it's a twofold test, but first it must apply the transaction and second, the transaction must be one in which liability has been imposed on you, because of concurrent negligence of Collyer.

That is where he says the rub comes, but Collyer is only negligent if that is breached duty. (4-186) It did not have to be a duty to Worthman because that's another matter entirely.

It breached a duty to its employee, but it didn't breach a duty to its employee because he argues under New York law, the employer owes a common-law and Section 200 duty to its employee only to protect them against the obvious.

What makes that ingenious is this, your Honor.

The Court: All I wanted to know is: Is that New York law?

Mr. Fetell: No. I am staying away from Mortonson.

The Court: What he said was he has three Court of Appeals cases.

Mr. Fetell: He doesn't.

Mr. Bakalor: I do.

Mr. Fetell: Absent the contract of indemnity—

The Court: That's all I wanted to know.

Is he right or wrong?

Mr. Fetell: Collyer can be negligent with impunity to its employee because it says I owe you no duty. You can sue him. I will stay with counsel's argument.

I owe you no duty and absent the contract—

The Court: What I want to know is whether they (4-187) owe him no duty other than to protect him against a hidden risk.

Mr. Fetell: The answer to that, it is not the law for this reason. Compensation is a suit bar—let me finish a sentence, if I may, your Honor.

The Court: I don't understand the expression.

Mr. Fetell: I am coming back. The obligation to provide a safe place to work addresses itself to anyone in control. He cited Wolf. It stood on the following proposition, than an owner out of control could not be held responsible to provide a safe place to work and an owner in control could. That was the proposition. An employer always owes a duty to his employees to provide them a safe place to work.

The only reason there are no cases is because there is a suit bar. He is precluded from suing him because of the Workmen's Compensation statute.

If the employer fails to carry compensation coverage, he can sue the duty. What I am saying is that to state an employer owes no duty is totally unsupportable.

The Court: I think that may have been true before Dole against Dowd. The Workmen's Compensation never

said an employer owes no duty to his employee. It said rather that it is an irrelevance. The (4-188) employer is liable to the limits set by the Workmen's Compensation statute and has it for employment of any injury an employee sustains, whether or not there was a breach of duty, but that doesn't mean that there are no breaches in duy because we know that occurs, because when the breach of duty is to extreme, there is no Workmen's Compensation feeling.

In other words, if the employer is the only one negligent towards an employee, he is liable.

Mr. Fetell: That's a different area. The cause of action, the obligation is the same to the employer as it is to others.

The Court: But there was one case. What was the case that followed Dole against Dowd in which they argued very strenuously, I guess R.E.: Green.

Mr. Bakalor: All the time.

The Court: They argued that if you have the Workmen's Compensation suit bar, that protects against Dole and Dowd too and it scratched its head and said no. No, it doesn't, and that's not true and in a lot of other states.

Mr. Bakalor: In Green, there is that case in the First Department, Third Department and Fourth Department.

Mr. Fetell: You know who won it. Mr. Kramer (4-189) beat me on that because he represented the Government in Galemo. The Government was the employer and can't be brought as a third party defendant. I lost that in the Court of Appeals after strenuous argument but the question was put to me by Judge Gurfein on that argument. Are there any cases that it is available to the state side employer. I didn't want to mention Green's name.

For years it has been rejected.

The Court: In New York.

Mr. Fetell: Certainly in New York.

The Court: And in the Second Circuit.

Mr. Fetell: Apart from the Government, yes.

The Court: That's because it is a highly special statute—

Mr. Fetell: Bad law.

The Court: Yes, the longshoreman case, it worked until the most recent change when they expressly ruled on that.

Mr. Fetell: I go back to the proposition that Collyer does owe a safe place to work to its employees and any argument—

Mr. Bakalor: I agree with that.

Mr. Fetell: He agrees?

Mr. Bakalor: Absolutely.

The Court: Safe place to work means safe in (4-190) the sense that it contains no latent menace. If the menace is patent, then says he, the safe place to work, duty is sufficiently discharged.

Mr. Fetell: Does anyone have a copy of the statute here? If anyone has a copy of 200 or 241, because it says "shall furnish." It says, "shall furnish" and failure to furnish safe equipment is a tort. Now, the trouble is you can't sue your employer for that tort. That's a tort I'm being sued here for here. Failure to furnish a proper scaffold to Mr. McKechnie, and I have a contract that says if my tort arises out of your work, then you'll indemnify me.

The Court: You have two things here and that is the second aspect of it and this I'd up with the contract question and I will get back to to it in a minute, that you agreed to furnish your own scaffold, if you are bound to in the general condition.

Mr. Bakalor: We did so agree but we could use their equipment at their discretion.

The Court: I would say here, there you can then argue you failed to furnish your own scaffolding in the situation in which you elected, through your foreman on the job, to use an unsafe scaffold, rather than to furnish your own safe scaffold. That's (4-191) another twist on it.

Mr. Fetell: And put me in peril.

Mr. Bakalor: That would be a question of duty.

The Court: We will resume discussion tomorrow morning. I think I would like to have it both ways on that, but as long as you are clear that you got it solidly on the record that—

Mr. Fetell: We do agree on this. If we reserve the third party suit, Judge Dooling—

Mr. Bakalor: That's a separate story.

Mr. Fetell: And adopt the jury's findings—

The Court: The other thing is I'm inclined to think that I probably have to decide the contract point as a matter of law. I'm not sure.

Mr. Bakalor: The point I am raising now—

The Court: No, no. The question whether or not they are the contracting party, I think that's the question of law. I'm not sure. I think it is.

Mr. Bakalor: Frankly, I'm not sure. I think it is, too. I don't know what facts the jury will decide. It either inures to their benefit or it doesn't. There is no dispute as to the facts.

The Court: That's what bothers me on that one, and I rather think it's one of those crazy things that may turn on something as simply as if they didn't put Inc. West Haven Builders. Therefore, they can't (4-192) say to you that that's the corporate contract binding on and

similarly on a similarly named corporation, when they would be excluded from showing anything except that it was Worthman that made the contract with the municipality. Worthman paid all the men on the job, paid all the bills, and was directing the work.

Mr. Fetell: And the stenographer made a mistake.

The Court: Looking at it the other way around, it's sort of like saying if they are estopped to deny they were a party to the contract, isn't Collyer in a way stopped to deny that they accepted the direction and their money and they bring them to make them perform their contract. I don't know.

Mr. Fetell: 10 o'clock, your Honor?

The Court: Yes.

(Thereupon, the above proceeding terminated at the time noted, 5:55 p.m.)

SPECIAL VERDICT

on

WRITTEN QUESTIONS

1. Was the plywood board on the canopy used as a scaffold by plaintiff at the direction or with the permission of Worthman?

Yes

If your answer to Question 1 is "No", proceed no further. The verdict will be for defendant.

2. Did plaintiff fall from the canopy because of the inadequacy of the plywood board as a scaffolding?

Yes

If you answer "No" to Question 2, proceed no further. The verdict will be for defendant.

3. What was the amount of plaintiff's damages resulting from the accident?

$26,000.00

Do not answer the following question unless you have answered "Yes" to Questions 1 and 2 and awarded damage in your answer to Question 3.

4. Was Collyer negligent in failing to provide safe scaffolding for the work on the canopy fascia?

No

Contract Between Worthman and Collyer.

THE AMERICAN INSTITUTE OF ARCHITECTS

AIA Document A401

SUBCONTRACT

Standard Form of Agreement Between Contractor and Subcontractor

Use with the latest edition of the appropriate AIA Document as follows:

A101, Owner-Contractor Agreement—Stipulated Sum
A107, Owner-Contractor Agreement—Short Form for Small Construction Contracts
A111, Owner-Contractor Agreement—Cost plus Fee
A201, General Conditions of the Contract for Construction.

This Document Has Important Legal Consequences; Consultation With An Attorney Is Encouraged With Respect To Its Completion Or Modification

This document has been approved and endorsed by the American Subcontractors Association.

AGREEMENT

made this 18th day of September in the year Nineteen Hundred and Seventy-Two

BETWEEN the Contractor:

Worthman Housing
550 Old Country Road
Hicksville, New York 11807

and the Subcontractor:

Collyer Associates, Inc
49 W 45th Street
New York, New York 10036

Contract Between Worthman and Collyer

Project:

Senior Citizens Apartments
New Rochelle, New York

Owner:

Architect:

Siegmund Spiegel, A.I.A. Tel #IV 3-8049
2035 Hempstead Turnpike
E. Meadow, New York

The Contractor and Subcontractor agree as set forth below.

ARTICLE 1

THE CONTRACT DOCUMENTS

The Contract Documents for this Subcontract consist of this Agreement and any Exhibits attached hereto, the Agreement between the Owner and Contractor dated Not Applicable, the Conditions of the Contract between the Owner and Contractor (General, Supplementary and other Condition), Drawings, Specifications, all Addenda issued prior to execution of the Agreement between the Owner and Contractor, and all Modifications issued subsequent thereto.

All of the above documents are a part of this Subcontract and shall be available for inspection by the Subcontractor upon his request.

The only Addenda and Modifications issued prior to the execution of this Subcontract and applicable to it are as follows:

Work Limited to work shown on Sheet A 7 of 12, Job No 68-8 issued 4-20-71, revised 6-18-71, 7-1-71. drawings issued for project by architect Siegmund Spiegel.

ARTICLE 2

THE WORK

The Subcontractor shall furnish material, supervision, labor, tools and equipment to completely face the parapet inside and out on the roof, the two (2) canopy facias over the entrances.

The material shall be Plasteel protected metal siding type C-3 color C4-007. All accessories and flashing are included.

NOT INCLUDED: field painting, removal of debris from job site, permits of any kind, furnishing of any payment or performance bond, cleaning or protection.

(Insert above a precise description of the Work covered by this Subcontract and refer to numbers of Drawings and pages of Specifications including Addenda and accepted Alternates.)

ARTICLE 3

TIME OF COMMENCEMENT AND COMPLETION

(Here insert the specific provisions that are applicable to the Subcontract including any information pertaining to notice to proceed or other method of notification for commencement of Work, starting and completion dates or duration, and any provisions for liquidated damages relating to failure to complete on time.)

As building progress and availability of material permits.

No extension of time will be valid without the Contractor's written consent after claim made by the Subcontractor in accordance with Paragraph 11.4.

Contract Between Worthman and Collyer

ARTICLE 4

THE CONTRACT SUM

The Contractor shall pay the Subcontractor in current funds for the performance of the Work, subject to additions and deductions by Change Order, the total sum of Thirty Thousand and 00/100 Dollars. $30,000.00

ARTICLE 5

PROGRESS PAYMENTS

The Contractor shall pay the Subcontractor monthly progress payments in accordance with Paragraphs 12.3 through 12.6 inclusive of this Subcontract.

(Here insert details on unit prices, payment procedures and date of monthly applications, or other procedure if on other than a monthly basis, consideration of materials and equipment safely and suitably stored at the site or other location agreed upon in writing, and any provisions for limiting or reducing the amount retained after the Work reaches a certain stage of completion which should be consistent with the Contract Documents.)

Applications for monthly progress payments shall be in writing and in accordance with Subparagraph 11.2.1, shall state the estimated percentage of the Work in this Subcontract that has been satisfactorily completed and shall be submitted to the Contractor on or before the 20th day of each month.

ARTICLE 6

FINAL PAYMENT

Final payment shall be due when the Work described in this Subcontract is fully completed and performed in accordance with the Contract Documents and is satisfactory to the Architect. Such payment shall be in accordance with Article 5 and with Paragraph 12.3 through 12.6 inclusive of this Contract.

Before issuance of the final payment the Subcontractor, if required, shall submit evidence satisfactory to the Contractor that all payrolls, bills for materials and equipment, and all known indebtedness connected with the Subcontractor's Work have been satisfied.

ARTICLE 7

PERFORMANCE AND LABOR AND MATERIAL PAYMENT BONDS

(Here insert any requirement for the furnishing of bonds by the Subcontractor.)

None Required

ARTICLE 8

TEMPORARY FACILITIES AND SERVICES

Unless otherwise provided in this Subcontract, the Contractor shall furnish and make available at no cost to the Subcontractor the following temporary facilities and services:

ARTICLE 9

INSURANCE

Prior to starting work, the Subcontractor shall obtain the required insurance from a responsible insurer, and shall furnish satisfactory evidence to the Contractor that the Subcontractor has complied with the requirements of this Article 9. Similarly, the Contractor shall furnish to the Subcontractor satisfactory evidence of insurance required by the Contract Documents.

The Contractor and Subcontractor waive all rights against each other and against the Owner and all other Subcontractors for damages caused by fire or other perils to the extent covered by property insurance provided under the General Conditions, except such rights as they may have to the proceeds of such insurance.

(Here insert any insurance requirements and Subcontractor's responsibility for obtaining, maintaining and paying for necessary insurance, not less than limits as may be specified in the Contract Documents shown below, or required by law. If applicable, this shall include fire insurance and extended coverage, public liability, property damage, employer's liability, and workmen's compensation insurance for the Subcontractor and his employee. The insertion should cover provisions for notice of cancellation, allocation of insurance proceeds and other aspects of insurance.)

ARTICLE 10

WORKING CONDITIONS

(Here insert any applicable arrangements concerning working conditions, and labor matters for the Project.)

ARTICLE 11

SUBCONTRACTOR'S RESPONSIBILITIES

11.1 The Subcontractor shall be bound to the Contractor by the terms of this Agreement and of the Contract Documents between the Owner and Contractor, and shall assume toward the Contractor all the obligations and responsibilities which the Contractor, by those Documents, assumes toward the Owner, and shall have the benefit of all rights, remedies and redress against the Contractor which the Contractor, by those Documents, has against the Owner, insofar as applicable to this Subcontract, provided that where any provision of the Contract Documents between the Owner and Contractor is inconsistent with any provision of this Agreement, this Agreement shall govern.

11.2 The Subcontractor shall submit to the Contractor applications for payment at such times as stipulated in Article 5 to enable the Contractor to apply for payment.

11.2.1 If payments are made on the valuation of Work done, the Subcontractor shall, before the first application, submit to the Contractor a schedule of values of the various parts of the Work aggregating the total sum of this Subcontract, made out in such detail as the Subcontractor and Contractor may agree upon, or as required by the Owner, and supported by such evidence as to its correctness as the Contractor may direct. This schedule, when approved by the Contractor, shall be used as a basis for Applications for Payment, unless it be found to be

in error. In applying for payment, the Subcontractor shall submit a statement based upon this schedule.

11.2.2 If payments are made on account of materials or equipment not incorporated in the Work but delivered and suitably stored at the site, or at some other location agreed upon in writing, such payments shall be in accordance with the terms and conditions of the Contract Documents.

11.3 The Subcontractor shall pay for all materials, equipment and labor used in, or in connection with, the performance of this Subcontract through the period covered by previous payments received from the Contractor, and shall furnish satisfactory evidence, when requested by the Contractor, to verify compliance with the above requirements.

11.4 The Subcontractor shall make all claims promptly to the Contractor for additional work, extensions of time, and damage for delays or otherwise in accordance with the Contract Documents.

11.5 In carrying out his Work the Subcontractor shall take necessary precautions to protect properly the finished work of other trades from damage caused by his operations.

11.6 The Subcontractor shall at all times keep the building and premises clean of debris arising out of the operations of this Subcontract. Unless otherwise provided, the Subcontractor shall not be held responsible for unclean conditions caused by other contractors or subcontractors.

11.7 The Subcontractor shall take all reasonable safety precautions with respect to his Work, shall comply with all safety measures initiated by the Contractor and with all applicable laws, ordinances, rules, regulations and orders of any public authority for the safety of persons or property in accordance with the requirements of the Contract

Documents. The Subcontractor shall report within three days to the Contractor any injury to any of the Subcontractor's employees at the site.

11.8 The Subcontractor shall not assign this Subcontract without the written consent of the Contractor, nor subcontract the whole of this Subcontract without the written consent of the Contractor, nor further subcontract portions of this Subcontract without written notification to the Contractor when such notification is requested by the Contractor. The Subcontractor shall not assign any amounts due or to become due under this subcontract without written notice to the Contractor.

11.9 The Subcontractor warrants that all materials and equipment furnished and incorporated by him in the Project shall be new unless otherwise specified, and that all Work under this Subcontract shall be of good quality, free from faults and defects and in conformance with the Contract Documents. All Work not conforming to these standards may be considered defective. The warranty provided in this Paragraph 11.9 shall be in addition to and not in limitation of any other warranty or remedy required by law or by the Contract Documents.

11.10 The Subcontractor agrees that if he should neglect to prosecute the Work diligently and properly or fail to perform any provisions of this Subcontract, the Contractor, after three working days' written notice to the Subcontractor, may, without prejudice to any other remedy he may have, make good such deficiencies and may deduct the cost thereof from the payments then or thereafter due the Subcontractor, provided, however, that if such action is based upon faulty workmanship or materials and equipment, the Architect shall first have determined that the workmanship or materials and equipment are not in accordance with the Contract Documents.

11.11 The Subcontractor agrees that the Contractor's equipment will be available to the Subcontractor only at the Contractor's discretion and on mutually satisfactory terms.

11.12 The Subcontractor shall furnish periodic progress reports on the Work as mutually agreed, including information on the status of materials and equipment under this Subcontract which may be in the course of preparation or manufacture.

11.13 The Subcontractor shall make any and all changes in the Work from the Drawings and Specifications of the Contract Documents without invalidating this Subcontract when specifically ordered to do so in writing by the Contractor. The Subcontractor, prior to the commencement of such changed or revised work, shall submit promptly to the Contractor written copies of the cost or credit proposal for such revised Work in a manner consistent with the Contract Documents.

11.14 The Subcontractor shall cooperate with the Contractor and other subcontractors whose work might interfere with the Subcontractor's Work, and shall participate in the preparation of coordinated drawings in areas of congestion as required by the Contract Documents, specifically noting and advising the Contractor of any such interference.

11.15 The Subcontractor shall cooperate with the Contractor in scheduling and performing his Work to avoid conflict or interference with the work of others.

11.16 The Subcontractor shall promptly submit shop drawings and samples as required in order to perform his work efficiently, expeditiously and in a manner that will not cause delay in the progress of the Work of the Contractor or other Subcontractors.

11.17 The Subcontractor shall give all notices and comply with all laws, ordinances, rules, regulations and orders of any public authority bearing on the performance of the Work under this Subcontract. The Subcontractor shall secure and pay for all permits, fees and licenses necessary for the execution of the Work described in the Contract Documents as applicable to this Subcontract.

11.18 The Subcontractor shall comply with Federal, State and local tax laws, social security acts, unemployment compensation acts and workmen's compensation acts insofar as applicable to the performance of this Subcontract.

11.19 The Subcontractor agrees that all Work shall be done subject to the final approval of the Architect. The Architect's decisions in matters relating to artistic effect shall be final if consistent with the intent of the Contract Documents.

11.20 THE SUBCONTRACTOR SHALL INDEMNIFY AND HOLD HARMLESS THE CONTRACTOR AND ALL OF HIS AGENTS AND EMPLOYEES FROM AND AGAINST ALL CLAIMS, DAMAGES, LOSSES, AND EXPENSES INCLUDING ATTORNEY'S FEES ARISING OUT OF OR RESULTING FROM THE PERFORMANCE OF THE SUBCONTRACTOR'S WORK UNDER THIS SUBCONTRACT, PROVIDED THAT ANY SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE (A) IS ATTRIBUTABLE TO BODILY INJURY, SICKNESS, DISEASE, OR DEATH, OR TO INJURY TO OR DESTRUCTION OF TANGIBLE PROPERTY (other than the Work itself) including the loss of use resulting therefrom, and (b) is caused in whole or in part by any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by him or anyone for whose acts he may be liable, regardless of whether it is caused in part by a party indemnified hereunder.

11.20.1 In any and all claims against the Contractor or any of his agents or employees by any employee of the Subcontractor, anyone directly or indirectly employed by him or anyone for whose acts he may be liable, the indemnification obligation under this Paragraph 11.20 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor under workmen's compensation acts, disability benefit acts or other employee benefit acts.

11.20.2 The obligations of the Subcontractor under this Paragraph 11.20 shall not extend to the liability of the Architect, his agents or employees arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Order, designs or specifications, or (2) the giving of or the failure to give directions or instructions by the Architect, his agents or employees provided such giving or failure to give is the primary cause of the injury or damage.

ARTICLE 12

CONTRACTOR'S RESPONSIBILITIES

12.1 The Contractor shall be bound to the Subcontractor by the terms of this agreement and of the Contract Documents between the Owner and the Contractor and shall assume toward the Subcontractor all the obligations and responsibilities that the Owner, by those Documents, assumes toward the Contractor, and shall have the benefit of all rights, remedies and redress against the Subcontractor which the Owner, by those Documents, has against the Contractor, insofar as applicable to this Subcontract, provided that where any provision of the Contract Documents between the Owner and the Contractor is inconsistent with any provision in this Agreement, this Agreement shall govern.

12.2 The Contractor shall promptly notify the Subcontractor of all modifications to the Contract between the Owner and the Contractor which affect this Subcontract and which were issued or entered into subsequent to the execution of this Subcontract.

12.3 Unless otherwise provided in the Contract Documents, the Contractor shall pay the Subcontractor each progress payment and the final payment under this Subcontract within three (3) working days after he receives payment from the Owner. The amount of each progress payment to the Subcontractor shall be equal to the percentage of completion allowed to the Contractor for the Work of this Subcontractor applied to the Contract Sum of this Subcontract, plus the amount allowed for materials and equipment suitably stored by the Subcontractor, less the aggregate of previous payments to the Subcontractor and less the percentage retained as provided in this Subcontract.

12.4 The Contractor shall permit the Subcontractor to obtain directly from the Architect evidence of percentages of completion certified on his account.

12.5 Unless otherwise provided in the Contract Documents, if the Architect fails to issue a Certificate for Payment or the Contractor does not receive payment for any cause which is not the fault of the Subcontractor, the Contractor shall pay the Subcontractor, on demand, a progress payment computed as provided in Paragraph 12.3 or the final payment as provided in Article 6.

12.6 The Contractor agrees that if he fails to make payments to the Subcontractor as herein provided for any cause not the fault of the Subcontractor, within seven days from the time payment should be made as provided in

Paragraphs 12.3 and 12.5, the Subcontractor may, upon seven days' additional written notice to the Contractor, stop his Work without prejudice to any other remedy he may have.

12.7 The Contractor shall make no demand for liquidated damages for delay in any sum in excess of such amount as may be specifically named in this Subcontract, and no liquidated damages shall be assessed against this Subcontractor for delays or causes attributed to other Subcontractors or arising outside the scope of the Subcontract.

12.8 The Contractor agrees that no claim for payment for services rendered or materials and equipment furnished by the Contractor to the Subcontractor shall be

Judgment Appealed From.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

RALPH MCKECHNIE,

Plaintiff,

against

WORTHMAN HOUSING ASSOCIATES, INC.,

Defendant.

WORTHMAN HOUSING ASSOCIATES, INC.,

Third-Party Plaintiff,

against

COLLYER ASSOCIATES, INC.,

Third-Party Defendant.

74-C-1219

This action having come on for trial before the Court and a jury, Honorable John F. Dooling, Jr., United States District Judge, presiding, and the Court having instructed the jury to find a special verdict on written questions and the jury having made answer to those questions and having found that:

1. That the Plywood Board on the canopy was used as a scaffold by the plaintiff at the direction of or with the permission of defendant Worthman; and

2. That the plaintiff fell from the canopy because of the inadequacy of the plywood board as a scaffolding; and

3. That plaintiff was damaged in the amount of $260,000.00 as a result of the accident, and

4. That third-party defendant Collyer Associates, Inc. was not negligent in failing to provide safe scaffolding for the work on the canopy facia,

it is

ORDERED AND ADJUDGED that the plaintiff recover of the defendant Worthman Housing Associates, Inc. in the amount of $260,000.00 together with interest and costs as taxed by the Clerk and that the third-party complaint against defendant Collyer Associates, Inc. is dismissed on the merits.

Dated: Brooklyn, New York
April 12, 1977

LEWIS ORGEL
Clerk

Notice of Appeal.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

RALPH MCKECHNIE,

Plaintiff,

against

BEACH HAVEN ASSOCIATES, Inc. and WORTHMAN HOUSING ASSOCIATES, Inc.,

Defendant.

WORTHMAN HOUSING ASSOCIATES, Inc.,

Third-Party Plaintiff-Appellant,

against

COLLYER ASSOCIATES, Inc.,

Third-Party Defendant-Appellee.

74 Civ. 1219 (JFD, Jr.)

SIRS:

PLEASE TAKE NOTICE that Third Party Plaintiff Worthman Housing Associates, Inc. does hereby appeal to the United States Court of Appeals for the Second Circuit from a judgment entered in the office of the Clerk of the Court on April 12, 1977, dismissing the third party complaint,

and from a denial of a motion by Worthman Housing Associates, Inc. for judgment n.o.v. pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, which motion was denied on May 2, 1977, and does hereby appeal from that part of the aforesaid judgment which dismissed the third party complaint, on questions of law and fact. No appeal is taken from the judgment in favor of plaintiff Ralph McKechnie.

Excerpts From Transcript.

(I-35) Q. Now, let us go to that site on December 18, 1972, were you working there at that time at that job site at the senior citizen apartment building? A. Right, I was there in December.

Q. When you say you were there in December, you don't remember the exact date in particular, is that correct? A. That's right.

Q. At that time in December of 1972, for whom were you employed? A. Collier Associates Inc.

Q. What kind of work did you do for Collier Associates Inc.? A. I am basically an ornamental iron worker, but I was their welding supervisor in the World Trade Center or any other welding problems that arise.

Q. How long did you work on that site, the senior citizen site in New Rochelle prior to something that happened to Ralph McKechnie? A. A few months.

* * *

(I-72) Q. You have to climb around construction sites to do your work? A. Not all the time. You will find most of the structural men doing the climbing around. The ornamental iron worker doesn't climb around too much.

Q. Are you called upon to place ornamental iron work at a level above your head where it's too high for you to reach up? A. Yes, but we have what we call working platforms.

Q. Who brings them onto the job? A. The company—excuse me. Sometimes the company and sometimes the general contractor.

Q. But it's common for the ornamental iron worker to bring or to have furnished on the job something to permit (I-73) the ornamental iron worker to climb higher than they can reach over their heads?

Mr. Segan: Objection.

The Court: He may answer.

A. Well, like I said before, I have been on many jobs where the general contractor took care of any platforms

and I can name the jobs, countless jobs, there was on at 100 Wall street, they furnished the entire working platform, our company did not. These things are worked out in contracts and sometimes we will work in conjunction with other companies. They will put up the platform and we work out an agreement where we use them also; but it could be that sheet metal men have to put it up, the carpenters, it could be almost anybody.

Q. You will accept the general proposition then that by the very nature of the work, ornamental iron worker does from time to time require something which would permit him to work above his head? A. Yes, I would say that is right.

Q. And to do that he is required to stand on either a ladder or a scaffold or a platform of some sort depending on the condition which exists at any given place, is that a fair statement to make? A. No, because a ladder in some cases can be a very dangerous thing. Extremely dangerous. She can go over (I-74) if you put too much pressure on her. I teach in school and I would never weld off a ladder. You have no equilibrium. You are looking for extreme danger.

* * *

(I-128) Q. Mr. Falasca, on the job, for approximately how long a period of time were you on that job before the accident? A. A month and a half, two months.

Q. This plywood that you have been talking about, when you first came on the job was the plywood in place? A. There were people working on that plywood.

Q. So, in other words, when you first came on the job, the plywood was in that place? (I-129) A. Yes.

Q. Did you put it in place? A. No.

Q. Did Mr. McKechnie put it in place? A. No.

Q. To your knowledge, did the Collier Associate people put it in place? A. No.

Q. So someone other than yourself and Mr. McKechnie

and other than Collier Associates put that plywood there? A. Yes.

Q. When you say people were working on that plywood, are you talking about other trades? A. Right.

Q. You had nothing to do with these other trades? A. No.

* * *

(I-130) Q. Now, you mentioned before that you had too much experience to move working platforms, is that your testimony previously? A. Right.

Q. When you said that, what did you mean by that, too much experience to move them? A. Well, in other words, when I came on the job there was a working platform there. If something is in my way I will go and tell the people who had put that up and generally sometimes it's the general contractors tell them I cannot perform my job because your platforms are in the way. It's up to him to either make a condition that I can work or just say to us, cancel that out a while and come back in a month or two which is done. But we never move another (I-131) man's platform because you don't know actually what is in there, because we did not build it.

* * *

(2-98) Q. Mr. Clark, were you working for Worthman Housing Associates somewhere in December, 1972 when an accident occurred to Ralph McKechnie? A. Yes, I was.

Q. Now, what was your job at that time—withdrawn. Let me ask you, where was that job located? A. It was located on Sixth Avenue in New Rochelle. On Sickles Avenue in New Rochelle.

Q. What job was being done at that time? A. On the outside.

(2-99) Q. Can you tell me what type of work was being done? A. It was construction of a building, a senior citizens' building.

Q. What was your job for Worthman? A. I was a laborer.

Excerpts From Transcript

Q. And, now, would you tell the jury what your job entailed? A. Well, the cleaning up after the crews and whatever.

Q. Did it involve carrying and moving and transporting things? A. Yes.

Q. Now, did you assist other people to do things? A. Yes.

Q. Now, who was your supervisor on the job? A. Mr. Serto.

Q. He was your supervisor on the job for Worthman Housing? A. He was.

* * *

(2-102) Q. Now, Mr. Clark, with respect to the day that this accident occurred to Ralph McKechnie, were you working that day? A. I was. Either on the sixth or seventh floor. I don't recall which floor.

Q. What were you doing on the sixth or seventh floor? A. I was cleaning up and we had some heavy sheets of sheetrock to be moved so I looked out the window to see if I could see another laborer or somebody to help me move the sheetrock.

Q. When you say that you, "looked out the window" can you tell us what part of the building you had looked out of from the window? A. Over the canopy.

Q. Which canopy? A. The one at the back.

Q. When you looked out the window in which direction did you look towards? A. Right towards you, facing you.

(2-103) Q. Did you look down? A. Yes, I did.

Q. Was that for the purpose of seeing if you can call somebody to help you upstairs? A. It was to get another laborer that was on the job. Right.

Q. Did you see another laborer? A. No.

Q. What did you see? A. I saw Ralph and Andy Serto.

Q. Where was Ralph? A. Ralph was on the canopy.

Q. And, when you say "on the canopy" was he standing on the canopy? A. On the front.

Q. You're talking about the canopy at the rear of the building; is that correct? A. Yes.

Q. The rear canopy? A. Yes.

Q. As far as you are concerned, how many canopies were there in this building? A. Two.

Q. One was in the front and one was in the rear, (2-104) we'll call it a rear canopy? A. Yes.

Q. Now, that is the one near, at the parking lot? A. That is correct.

Q. And, you saw Ralph McKechnie you said standing on it? A. Yes, he was.

Q. Now, what was this canopy made of? A. Up to that time it was made of a plywood material.

Q. What about the frame of the canopy? A. Well, the frame of the canopy was iron and then there was sheetrock on top of it. I mean plywood, not sheetrock.

Q. Sheetrock was what you were trying to move upstairs? A. Yes.

Q. And, then there was plywood on iron; is that correct? A. Yes.

Q. Could you see the plywood when you looked down, when you looked for the laborer? A. Yes.

Q. And, was Ralph standing on the plywood?

(2-105) Mr. Fetell: I object to his leading this witness any further.

The Court: Please do not lead.

By Mr. Segan:

Q. With respect to the canopy do you know if there was any sheetrock down on the canopy? A. You got me. I seen that it was plywood that was on the canopy.

Q. Do you know who put it there? A. Me and another guy. Another laborer put it there.

Q. By whom was the other laborer employed? A. Worthman Housing

Q. Let's think of the time of Ralph's accident, the day when you and this other employee, did you and another

laborer of Worthman put the plywood up there? A. It was approximately two or three weeks.

Q. And, could you tell us when you put it up on there?

The Court: Don't lead the witness. Ask him what happened, what were the circumstances that he put it up there.

By Mr. Segan:

Q. Would you tell us what the circumstances were (2-106) that you and another laborer put the plywood up on the canopy? A. Well, we put the plywood up there because we were told to go up there by Andy Serto.

Q. What was the purpose of putting it up there? A. So, it's well like, it's a corner there. You know by the brickees working, they had a scaffold and they couldn't let it down. They couldn't do the work.

Q. Was that for the purpose to allow the brickees to get into that area, that they could not get a scaffold into that area; is that correct, the purpose? A. Yes.

Q. How was that plywood going to be used that was placed on the steel? A. It was going to be used for the brickees to finish their work in the corner.

Q. Mr. Clark, did you observe the brickees working up there on top of this plywood on the canopy in the rear? A. Yes.

Q. Beside the brickees who else worked up there? A. We went back up there—

Mr. Fetel: Objection to the form of the question. It presupposes matters not in evidence and he is leading the witness.

(2-107) By Mr. Segan:

Q. Mr. Clark, could you tell us from your knowledge, besides the brickees, did anybody else use that area where the plywood was on top of the steel? A. Yes.

Q. Who else to your knowledge? A. We used it, me and another laborer.

Q. Excuse me one second. With respect to the time, was that before or after the day of Ralph's accident? A. When we used the plywood?

Q. Yes. A. It was before the accident. Right after the brickees finished.

Q. Now, how did you come to that area? A. Well, the brickees finished and we had to go up and clean up and that means cleaning the bricks or whatever they left up there.

Q. And, was that area, that plywood area that you put up there, was that used as a platform to work on?

Mr. Fetell: I object to the form of the question.

A. We were working in that area doing some work.

Mr. Fetell: I object to the form of the question.

(2-108) The Court: That is all right.

By Mr. Segan:

Q. And, the work that you were doing up there, what kind of work were you doing up there? A. We were cleaning up the brickees. They finished.

Q. It was part of the work of the construction of that building? A. Yes.

Q. Was that pursuant to anybody's orders? A. To Anthony Serto.

* * *

(2-112) Q. With respect to the plywood that you put down, how many pieces did you put down, sir? A. Two.

Q. And, of the two pieces that you put down sir, could you tell me how you secured them if at all? A. We didn't secure it.

Q. What did it rest on? A. We rested it on the front piece which is the longer piece and on the piece behind it next to the wall so it would be in other words, like my hands.

Q. Your right hand on top of your left hand? A. Yes.

Q. That would be the right hand representing the front piece? A. Yes.

Q. With regard to the steel, what part if any of the steel did you rest it on? A. We rested it on the steel going across here. We rested it like this, maybe two or three inches from the (2-113) edge of the steel back this way.

Q. So the front piece of plywood was resting on the front steel; is that correct? A. Yes.

Q. What about the side steel? A. The same. That was as close as we could get.

Q. So basically you had it on steel and some of it was—there was intermediate steel in-between? A. Yes, there was.

Q. Was the plywood resting on it also? A. Yes, sir.

Q. And, that was the only thing you did with respect to laying the plywood? A. Yes.

Mr. Segan: I have no further questions.

* * *

(2-140) Q. Mr. Clark, I am going to ask you a few questions, sir. About how long prior to the accident had you put up the plywood, sir? A. Approximately three weeks.

Q. And, you put this up pursuant to the instructions of your superintendent, Mr. Serto; is that correct? A. Yes.

Q. Now, I think you put it up with another man? A. Yes.

Q. Do you remember his name? A. A laborer by the name of Jones.

Q. Do you know who he was a laborer for, for whom he was working? A. Worthman Housing.

Excerpts From Transcript

(2-141) Q. Now, when you put this up, and correct me if I am wrong, nobody from Collyer helped you put it up? A. No.

Q. This work was being done by Worthman; is that correct? A. Yes.

Q. When putting up this plywood the people were working for Worthman; is that correct? A. Yes.

Q. And, it was being put up pursuant to instructions by people who work for Worthman; is that correct? A. I don't understand—

Q. Let me withdraw that. In other words, the person who told you to put this up, he was working for Worthman? A. Yes, he was.

* * *

(2-175) Q. And, when you came down from the roof somewhere around one o'clock on December 18th, 1972 what did you do with the materials or whatever you brought down from the top? A. What did we do?

Q. Yes. A. We were actually rolling up everything. I took the tools home like the power tools and we were getting ready to leave.

Q. And, then what happened? A. The superintendent of the job came out and he said where are you going?

Q. Who was that? A. Andy Serto.

Q. And, what did he say to you if anything? A. Well, he said you can't go home. He said that he wanted me to do the canopies. I wasn't ready to do the (2-176) canopies because it was a whole new setup. He said I was told by the company that you would do it as soon as you could.

* * *

(2-177) Q. Now, you found out that the materials were not suitable for whatever purpose, that the materials were not suitable for the front canopy, what did you do then? A. I in turn went to Mr. Serto.

Q. What did you say to him and what did he say to

you? A. I stated to him that I could not start any work on the canopy. So he said to me why don't you start on the rear canopy because it is a different canopy.

• • •

(2-178) Q. Now, what did you say to him when he asked you to do the rear canopy if anything? A. Well, I said first I'll check the material.

Q. Did you check the material? A. Yes.

Q. What did you find? A. It looked okay to my eye. I thought I could work with it.

Q. What did you say to him if anything after that? A. Actually, he walked out with me to the back area and he was trying to project an idea of his on the front roof. That the sheeting was hanging over at an angle and the way they threw it over the steel it was out at an angle and it was not the steel on the roof I'm talking about. Now, the sheeting was actually sticking out this way (indicating) on the bottom, the sheeting was on an angle like.

(2-179) Q. And, what happened? A. I said I don't know. It could be near the steel so he said why don't you try it that way. You can get on with the rest.

Q. What did you say to him? A. I said to him fine. I said that we'll work in that area but I have to call the company first and report the material that's wrong so they would bring the right ones.

I said that I definitely needed a ladder and he said to me that there might be a ladder inside but I didn't know anybody on the job so he told me to go into, I believe the steamfitters or pipefitters and ask them.

Q. Now, when you say that you needed a ladder, did you discuss the purpose of the ladder with Mr. Serto? A. Yes. I told him that I needed the ladder to get up to the working platform.

Q. Where was that? A. On the canopy.

Q. You're talking about the rear canopy? A. I'm talking about the rear canopy.

Excerpts From Transcript

Q. My question is when you went with Mr. Serto towards the rear canopy and talked with him, did you have occasion to observe the rear canopy and the materials or what was on the rear canopy? (2-180) A. Well, I naturally looked at it. At the area and it looked good. Underneath there were steel beams coming out.

Q. Now, after you spoke with him and discussed the business of getting on the canopy, what did you do, was a ladder procured? A. We walked inside the building and the doors are generally opened so we walked in and we weren't too far into the next room and Andy asked the steamfitters, he said this is an ornamental iron worker and could you loan him a ladder? They said if you carry it out and I carried it out. Then he walked out with me and when we got out of there Serto said to me I believe there is another ladder hidden behind the boiler. Would you like that also? I said fine, which is the easiest way to get up there. It actually wasn't that big a ladder. It was a smaller ladder.

* * *

(3.133) Q. Is it correct there were approximately thirty trades on that job? Is that a fair estimate? A. I didn't count. Sir, we get coffee breaks and we had no elevator and we had to walk through the building.

Q. And the brickees is the only ones you can describe their location of work on the canopy where you had your accident; is that what you're telling us? A. I saw other people on that canopy and I said I thought they were handing material through a window, but I saw them working.

* * *

(3.135) Q. Mr. McKechnie, I will ask you a few questions mostly pertaining to the construction of the canopy on the day of the accident.

Now, Mr. McKechnie, on the date of the accident prior to the time you went up on the plywood, had you walked

under the plywood? A. I had occasion to go into the door at times.

Q. That's what I mean, sir. A. Yes, sir.

Q. I mean, on some occasions you have—you had walked under the plywood that day? A. Yes.

Q. Had you looked up? A. I didn't think I was going to work there, but I had seen it, yes.

Q. Let's take the period of time after you knew you were going to work there. A. Yes, sir.

(3.136) Q. Had you looked up at the plywood prior to the time you had actually gone up there? A. Yes.

Q. And when you looked up at the plywood did you notice any beams? A. Yes.

Q. Or flanges that Mr. Fetell has called them? A. Yes.

Q. Now, using Mr. Segan's table—

Mr. Fetell: He will have to take it home with him.

Mr. Bakalor: I don't know what we would do without the table.

Q. And assuming the building is where the jury is—and you used the term perimeter steel at one point. A. Yes.

Q. Facing the building furthest from the left, what is the perimeter steel? A. The outside piece.

Q. The furthest outside piece of steel? A. That's correct.

Q. And this piece of steel, would it run from the outer portion of the canopy straight back towards the building, is that right? (3.137) A. Yes.

Q. Sort of like a railroad track type of thing? In other words, piece of steel running straight, level, approximately level from the outside, straight back to the building; is that right? A. That's right, sir.

Q. Now, talking about just the piece of plywood upon which you were standing at the time of the accident,

did this piece of plywood rest on this perimeter steel at all? A. Yes, it did, sir.

Q. And I believe you testified that it was partially—you could see a portion of the perimeter steel; is that correct? A. That's correct.

Q. And approximately how much of the perimeter steel could you see approximately? A. Approximately two to three inches.

Q. And could you approximate again for us the width of the perimeter steel? A. I had thought it was about six to eight inches.

Q. So, again, as Mr. Fetell asked you, the piece of plywood had rested somewhere, four or five (3.138) inches of plywood on steel? A. I would think so, yes.

Q. And it wouldn't have rested in one place, it would have rested its whole four feet straight across on the perimeter steel; is that correct? A. Yes.

Q. So that anyone looking at that set-up would see, as far as the furthest left portion of the canopy, would see a piece of plywood, all four feet of it lying on approximately four or five inches of a piece of steel; is that correct? A. Yes.

Q. And as you started moving towards the right, eventually there came a point there was a junior beam; is that correct? A. That's correct.

Q. Now, can you describe the difference to us as comparing a junior beam as compared to a piece of steel? A. The junior beam is smaller.

Q. Did it lie in the same direction? A. No.

Q. How does the junior beam lie? A. It goes front to back.

(3.139) Q. When you say front to back, from the beginning of the canopy to the back of the building? A. That's right.

Q. And this piece of steel to the left, it also ran from the front of the canopy to the back of the building? A. That's right.

Q. So the junior beam in fact was running the same way as the furthest left perimeter beam? A. Yes.

Q. But the junior beam was somewhat smaller? A. Yes, sir.

Q. When you say somewhat smaller, can you approximate it for us? A. No, sir, I can't.

Q. Was it something like three inches or five inches or something like that? A. I really wouldn't say. I would be just guessing.

Q. It's not a half inch or something like that? A. No, sir. It's a support and it has to be much heavier than that.

Q. And this first junior beam that we are talking about, had you seen this junior beam before you (3.140) went up on to the plywood? A. Had I seen beams underneath it?

Q. Yes. A. Yes, I think I did.

Q. And I think you testified to Mr. Fetell's questions that at this time you didn't recall where this junior beam was; is that correct? A. That's right.

Q. And if I show you Plaintiff's Exhibit 2A in evidence, which has been identified as the plan of the canopy, let me ask you if you look at this plan if it refreshes your recollection as to where the first junior beam was approximately.

(Handed to the witness.)

A. It's right in the middle.

Q. Okay.

Now, this piece of plywood—let me withdraw that.

When you say the junior beam is right in the middle, in the middle of what, sir? A. In the middle of the diagram you showed me.

Q. In any event, would it be fair to say that when you said to Mr. Fetell that when you were on the plywood you were standing over a junior beam that this would have been the junior beam you were standing over? (3.141)

A. If it was the first one I would be in that vicinity; yes, sir.

Q. If you stay in that vicinity, there is only one junior beam in that vicinity? A. I don't know if I was exactly on the beam or a little over.

Q. In any event, you were standing approximately there on or about the first junior beam in the middle of the canopy? A. That's correct, sir.

Q. Now, the plywood, prior to the time you got on the plywood, all four feet of the plywood was also lying on this junior beam; isn't that correct? A. That's right, sir.

Q. Without going any further to the right for the moment, prior to the time you got onto the plywood we have a piece of plywood lying four or five inches across all four of its feet on the left perimeter, and we have the same piece of plywood lying on another piece of structural steel, all four feet of it across; isn't that correct? A. Yes.

Q. And now moving further to our right there was another junior beam; isn't that correct, sir? (3.142) A. Yes.

Mr. Bakalor: If I may, your Honor, read to the jury from Plaintiff's Exhibit 2A—3A, that the second junior beam was seven feet two inches from the left perimeter steel?

Mr. Segan: Excuse me, your Honor. May we stipulate if it's all right for counsel, using again the map, that from the perimeter steel on the left all the way over to the second junior beam was seven feet two inches.

Mr. Fetell: To say what?

Mr. Segan: From the second junior beam from the left.

Mr. Fetell: The second junior beam?

Mr. Segan: Yes.

The Court: That is stipulated then, gentlemen?

Mr. Bakalor: Yes, sir.

The Court: Well, it's in evidence.

(All three counsel confer with each other out of the hearing of the Court Reporter.)

Mr. Fetell: We are in agreement, your Honor.

Q. And I believe you have previously testified (3.143) that the piece of plywood was approximately four feet by eight feet; is that correct, sir? A. Yes, sir.

Q. And that is the normal length of a piece of plywood used in the trade; is that correct? A. Yes, sir.

Q. So this eight foot piece of plywood was not only resting on the left perimeter and not only resting on the structural steel in the middle, but was also resting on the second junior beam; isn't that correct? A. Yes, according to that plan.

Q. And when I say resting on the second junior beam, all four feet of it was resting on the second junior beam, isn't that correct, sir? A. Yes, sir.

Q. And when you were up there I think you said you were looking around for two minutes to do your work or getting ready to do your work, did you notice how much of any of the second junior beam was showing under the plywood, if any? A. I didn't notice.

Q. Can you tell us whether or not at that point the plywood had completely gone past the full width (3.144) of the second junior beam, if you recall? A. I don't recall.

Q. Now, prior to the time you came up you had seen all this, isn't that correct, that the plywood was resting on all these beams? A. I knew it was resting on beams, yes.

Q. And isn't it a fact, sir, this plywood, as far as you were concerned, made up some sort of a stationary platform? A. That's correct.

Excerpts From Transcript

Q. Stationary like a stationary floor to walk on; isn't that correct? A. Yes.

Q. And from the time you got onto the plywood, as far as you were concerned, unless the steel beams fell, there was no way for the plywood to fall; isn't that correct, sir? A. That's how I felt.

Q. And you had seen people walking on this plywood many times; isn't that what you told us? A. I had seen quite a few people.

Q. The brickees, I think you testified, people passing things in and out of windows, I think you testified? (3.145) A. Yes, sir.

Q. Laborers? A. Yes, sir.

Q. And on all these occasions you saw this, the plywood never fell? A. That's correct, as far as I know.

Q. From what you saw? A. I never saw it fall.

Q. You never saw any structural beams fall, did you? A. No, sir.

Q. And you have been working in the trade some ten years or so— A. Yes, sir.

Q. —at the time of the accident? A. Yes.

Q. And you had seen people walk on these type structures on construction jobs all the time, haven't you? A. Many times.

Q. This is a normal type of thing to see? As a matter of fact, let me ask you this, sir: I know you don't walk on structural beams, on constructural jobs such as Olympic Towers and World Trade Center; you (3.146) see construction men walking on constructural beams many times? A. Many, many times.

Q. And so wouldn't you say on almost every construction job you see men walking on stationary platforms such as this, day in and day out? A. That's right, sir.

Q. And in fact, sir, that prior to the time you went up on this plywood as far as you were concerned, in your experience in ten years in the trade this plywood lying along these three structural beams was perfectly safe

to go on? A. As far as I was concerned I thought it was safe.

Q. And when you were up there for two or three minutes, you felt secure there? A. Yes, I did.

Q. You didn't see anything wrong when you were up there? A. No, sir.

Q. Now, you were the supervisory personnel on the job site for Collyers; isn't that correct? A. That's correct.

Q. And in other words, there were two men and (3.147) you were the working foreman? A. That's correct.

Q. So as far as Collyers was concerned, what was being done for them as a supervisor capacity at the job site was being done by you? A. That's right.

Q. So you were the man for Collyers who was to make the determination, if anybody from Collyers was to make the determination, whether anything was safe on the job; is that correct, sir? A. Yes, sir.

Q. And you, in fact, prior to the time you went on this plywood had made this determination that the plywood was safe for you to go up there; isn't that correct? A. Yes, sir.

Q. And if it wasn't you wouldn't have gone up there; isn't that correct? A. That's true, sir.

Q. And I think we were talking about whether you saw a stationary platform or stationary flooring, what you had is taken the two pieces of platform, which I believe Mr. Clark mentioned, basically an area forgetting the overlap of approximately four by eight? (3.148) A. I don't understand the question.

Q. Let me start again.

In addition to the piece of plywood you were on when the accident occurred, in front of that was another piece of plywood; isn't that correct? A. Yes, sir.

Q. And that second piece of plywood was also four foot by eight foot; isn't that correct? A. I don't know, sir.

Q. Approximately? A. I saw overlapping, so I couldn't really see.

Q. Now, putting the two pieces together, wouldn't that give you—just the two pieces forgetting any other pieces, those two pieces together would give you an area of approximately eight by eight; isn't that correct?

Mr. Segan: I object to that.

Mr. Bakalor: I will withdraw that question.

Q. All right.

In any event, when this accident happened you didn't fall off the side, did you, sir? A. Off the side?

Q. In other words, you were walking so close to the side that you fell off the side? (3.149) A. No, no.

Q. In other words, you were standing somewhere, and not to be exact, obviously, but somewhere in the middle or toward the middle of the plywood when you were standing in the middle when the accident occurred? A. Yes.

Q. Wouldn't that be correct? A. Yes.

Q. And the plywood, again getting back to our table just for the moment— A. Yes, sir.

Q. When the accident occurred the plywood didn't tip towards Mr. Segan's direction; is that correct? A. That's right.

Q. And it didn't go towards the building? A. No, sir.

Q. And it didn't tip towards your partner, Mr. Falasca? A. No, sir.

Q. All right.

So the plywood also did not tip inside—let me withdraw that and ask you another question first.

We talked about perimeter here. What about the outer portion? Is there also a perimeter still there? (3.150) A. Yes, there was.

Q. So what you have is a perimeter steel running on the left, a perimeter steel running on the outside, with several junior beams or two junior beams running from the outer perimeter into the building; isn't that correct? A. Yes.

Q. So when the accident occurred the plywood didn't tip toward the outer perimeter? A. No. It couldn't because there were beams there.

Q. That's right, there were beams there, so it couldn't. So your testimony is that the plywood slid off somehow, which you don't know how it happened, slid off completely, its entire four feet off the beams, and somehow drop on the outside of the outer perimeter; is that correct? A. Yes.

Q. The plywood didn't break; is that correct? A. When I was on it?

Q. Yes. It didn't crack in half? A. No.

Q. Or fall through or anything like that? (3.151) A. No, sir.

Q. Prior to the time that you went up onto the plywood, did you have any idea whatsoever under any possible circumstances how you could figure the plywood would slide off the steel beams?

Mr. Fetell: I object to the form of the question, extremely speculative, extremely speculative.

The Court: No. He is asking him whether he had any concept at the time, as I understand.

Mr. Bakalor: Right.

Mr. Fetell: And how it could have.

The Court: As to how it could have done that. But he is asking facts as to his state of mind toward the plywood. And its stability.

Mr. Bakalor: Thank you, your Honor.

The Witness: You're asking coming off this way?

Q. Prior to the time you went up there did you have any conceptional idea how plywood could come off these various structural merges we are talking about, slide four feet or five feet, whatever the distance is, and cause you to fall off— A. No.

(3.152) Q. —the stationary floor?

And your answer to that is no? A. My answer is no.

Q. And in fact, even today, this is after it's happened? A. That's correct.

Q. And after you had time to think about this over the years, you still can't conceive how it actually happened? A. I have no idea at all.

Q. And as far as you are concerned, going up on that type of plywood flooring on the day of the accident is something that's done time and time again in the construction trade and prior to the time you went up there you thought it was perfectly safe; isn't that correct, sir? A. Yes, sir.

* * *

(3.164) Q. I forgot to ask you previously, you said Mr. Serto told you to use the platform? A. He said I could work off it.

* * *

service of three (3) copies of

the within Appendix is

hereby admitted this 22nd day

of August, 1977

Quist & Bahalor PC

Attorney for Collyer